19 (1)

No. ____

In the Supreme Court of the United States

RICHARD F. ALLEN,
Commissioner of Alabama Dept. of Corrections,
Petitioner,

v.

HERBERT WILLIAMS, JR.
Respondent.

On Petition for a Writ of Certiorari to
The Court of Appeals for
the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

(Capital Case)

Respondent Herbert Williams, Jr. presented new mitigating evidence at a state post-conviction hearing to establish a claim of ineffective assistance of counsel. In finding that Williams failed to establish prejudice, the state courts considered the new evidence in its weighing process, assigning it "little mitigation value" because the evidence possessed no "causal relationship" with Williams's long-planned and premeditated crime. Under 28 U.S.C. §2254(d)(1), the Court of Appeals for the Eleventh Circuit granted Williams habeas relief because, in its opinion, the state courts "failed to give sufficient weight to mitigating evidence that did not relate to the aggravating circumstance in the case." App. 35a.

In light of this Court's admonition that, "the Constitution does not require a state to ascribe any specific weight to particular factors, either in aggravation or mitigation," *Harris v. Alabama*, 513 U.S. 504, 512 (1995), the question presented is:

In assessing whether a defendant was prejudiced by his counsel's failure to present additional mitigating evidence during a capital sentencing proceeding, does a state appellate court unreasonably apply "clearly established Federal law, as determined by [this] Court," 28 U.S.C. §2254(d), when it emphasizes the absence of a "causal relationship" between the mitigating evidence and the underlying murder when determining the weight of the mitigating evidence?

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The opinion of the court of appeals is reported at 542 F.3d 1326. App. 2a-44a. The opinion of the district court is not published in the *Federal Reporter* but is reported at on-line at 2006 WL 3075635. App. 45a-109a.

STATEMENT OF JURISDICTION

The court of appeals' judgment was entered on September 17, 2008, and the court denied the State's timely petition for rehearing *en banc* on November 13, 2008. App. 167a. This petition is timely because it is filed within 90 days of the court's order refusing an *en banc* rehearing. *See* Sup. Ct. R. 13.3. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

2. The Antiterrorism and Death Penalty Act of 1996 provides in relevant part: "(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim – (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States[.]" 28 U.S.C. § 2254(d)(1).

STATEMENT OF THE CASE

This case presents yet another grant of §2254 habeas relief by a federal court of appeals without the basis of "clearly established" precedent from this Court. *See, e.g., Wright v. Van Patten*, __ U.S. __, 128 S. Ct. 743 (2008) (reversing the grant of §2254 relief because no clearly established case law exists on the question of whether counsel's appearance by speaker phone violates the Sixth Amendment); *Carey v. Musladin*, 549 U.S. 70 (2006) (reversing the grant of §2254 relief because no clearly established case law exists on the question of whether "spectator-conduct" can require reversal of a defendant's conviction). Here, the Court of Appeals for the Eleventh Circuit wrongly granted §2254 habeas relief to Respondent by holding that, when determining whether a death-row inmate is prejudiced by counsel's failure to present additional mitigating evidence at trial, *Strickland v. Washington*, 466 U.S. 668 (1984) forbids a state appellate court from determining the amount of weight to give newly-presented mitigating evidence by referring to the evidence's ability (or lack of ability) to extenuate the facts of the inmate's crime.

To date, the Court's death-penalty precedent distinguishes between the questions of (1) whether relevant mitigating evidence can be excluded from the sentencer's consideration and (2) how much weight the sentencer must give it. As long as a sentencer is allowed to consider all relevant mitigating circumstances, the Court has left the question of how much weight to assign the evidence to the sentencer and state appellate courts. *See, e.g., Harris v. Alabama*, 513 U.S. 504, 512 (1995); *Barclay*

v. Florida, 463 U.S. 939, 961 n.2 (1983); *Eddings v. Oklahoma*, 455 U.S. 104, 114-15 (1982).

As shown *infra*, the court of appeals wrongly crossed the line between exclusion and weight. Because the court did so without the backing of "clearly established" caselaw from this Court, *see* 28 U.S.C. § 2254(d)(1), certiorari review is warranted to correct the error.

A. The Murder of Timothy Hasser

Herbert Williams was obsessed with stealing Timothy Hasser's model 928 Porsche. For months, Williams conveyed his desire to friends, telling them he would soon possess a Porsche. Vol. 6 at 120-23; 129-132; 153; 160-63; 181-82; Vol. 7 at 10-11. He wrote about it in his diary; specifically detailing how he would obtain a gun, catch a ride to Mobile, and then walk to Mr. Hasser's house. Vol. 5 at 122. Williams even chronicled his scheme to break into the "back" of Mr. Hasser's home and await his return if the Porsche was not present upon Williams's arrival. *Id.*

On November 2, 1990, Williams executed his plan. Upon arriving at Mr. Hasser's empty home, Williams broke in through the rear bedroom window and then climbed into the attic when police officers arrived to check the security alarm that Williams tripped upon entering. When Mr. Hasser returned home, Williams abducted him at gunpoint and had Mr. Hasser drive to an abandoned building 15-20 miles away. Vol. 2 at 43-45. Evidence indicates that Williams next had Mr. Hasser draft and sign fake documents purporting to convey ownership of the Porsche to Williams. *Id.* at 118-19. Williams then murdered Mr. Hasser with three gunshots to the

back of the head. *Id.* at 80-84. Williams was apprehended while driving the Porsche, shortly after being observed in his unsuccessful attempt to throw Mr. Hasser's body off of a bridge into a nearby river. Vol. 6 at 5.

Williams gave three inconsistent statements to police, each proving to be implausible. In his final statement, Williams claimed that he and Mr. Hasser dealt drugs together, and that Mr. Hasser had promised to give Williams the Porsche and $7,500 at the end of their present deal. Vol. 6 at 90. According to Williams, the deal went south when a group of drug dealers murdered Mr. Hasser but allowed Williams to live. *Id.* at 97-98.

B. Trial and Direct Appeal

At trial, the State introduced Williams's diary, his statements to police, the fake documents conveying the Porsche to Williams, and the testimony of several persons to whom Williams conveyed his lust for the Porsche. The State further established that the gun used to shoot Mr. Hasser was the same gun Williams concealed under the front seat of the Porsche and that the weights police found strapped to Mr. Hasser's feet matched weights found in Williams's home. Vol. 6 at 23, 140.

In defense, Williams argued that he and Mr. Hasser knew each other, and that Mr. Hasser was killed in a drug deal gone awry. Along that line, Williams further argued that Mr. Hasser had conveyed the Porsche to him before the murder; thus, eliminating a finding of robbery.

The jury found Williams of murder during the course of a robbery, a capital offense under §13A-5-

40(a)(2) of the Alabama Code.

At the penalty phase, Williams presented one witness in mitigation: his mother, Arcola Williams. Mrs. Williams testified that:

- Due to her poverty, Williams lived with his grandmother until age four, Vol. 4 at 118-19;
- Upon moving in with his parents, Williams was repeatedly beaten by his father;
- Williams's father was an alcoholic, Vol. 3 at 121;
- Williams's father "whipped his [children] more than he should," Vol. 3 at 119;
- As Williams grew, his father began to "beat" him with "his fists," Vol. 3 at 120;
- After one incident, Williams called the police to report that his father "choked him and did everything to him while he was in there," Vol. 3 at 121;
- At the time of trial, Williams's father was in jail on charges for molesting and raping the couple's 14-year-old, mentally retarded daughter, Vol. 3 at 122.

In addition to this non-statutory mitigating evidence, Williams's trial counsel argued two statutory mitigating factors: (1) Williams's lack of significant criminal history and (2) Williams's young age (19) at the time of the murder. *See* Ala. Code §13A-5-51(1), -51(7). The State argued one statutory aggravating circumstance, which it proved during the guilt phase: Williams committed the murder committed during the course of a robbery. *See* Ala. Code §13A-5-49(4).

By a 9-3 vote, the jury recommended Williams be sentenced to life without parole.

Under Alabama law, the trial judge is the ultimate sentencer. Ala. Code §13A-5-47. After weighing Williams's three mitigating circumstances and the jury's recommendation against the State's aggravating circumstance, the Honorable Ferrell McRae sentenced Williams to death.

Judge McRae's weighing process is contained in his sentencing order. *See* Vol. 1 at 113-22. In determining the weight of aggravation, Judge McRae gave great significance to the calculated precision with which Williams planned and systematically executed the murder-robbery. Vol. 1 at 117-18. Specifically, Judge McRae found that Williams's diary entries demonstrated "greed and depravity of mind and characteristics of an individual who has an utter disregard for human life and the rights of property of others," Vol. 1 at 118, and that the events which led Mr. Hasser's death were not "the product of chance; rather, these events were planned and executed with military-like precision." Vol. 1 at 114.

In mitigation, Judge McRae found and considered each of the mitigating circumstances argued by Williams at trial: age, lack of criminal history, and troubled childhood. Vol. 1 at 119-121. Judge McRae gave them little weight, however, as indicated by his findings (1) that the "reptilian coldness with which this criminal act was devised and perpetrated vitiates any contention that the innocence of youth was a factor in the murder of Timothy Hasser," Vol. 1 at 120, and (2) that Williams's father was "violent and abusive toward him as a child" "makes [Williams] no less accountable for his action."

As required by Alabama law, both the Alabama Court of Criminal Appeals and the Supreme Court of Alabama independently weighed the same aggravating and mitigating circumstances on direct appeal. *See* Ala. Code §13A-5-53(b)(2). Both courts affirmed Williams's conviction and sentence. *Williams v. Alabama*, 627 So. 2d 994 (Ala. Crim. App. 1992), *aff'd*, *Ex parte Williams*, 627 So. 2d 999, 1005 (Ala. 1993). This Court denied Williams' petition for writ of certiorari. *Williams v. Alabama*, 511 U.S. 1012 (1994).

C. State Post-Conviction Proceedings

Pursuant to Rule 32 of the Alabama Rules of Criminal Procedure, Williams filed a post-conviction, "Rule 32" petition with the Mobile County Circuit Court collaterally attacking his conviction and death sentence. Relevant here, Williams claimed that his trial counsel was ineffective under *Strickland* for failing to investigate and present additional mitigating evidence during the penalty-phase.

Judge McRae—*i.e.* the same judge who presided over Williams's trial and sentencing—granted Williams an evidentiary hearing to present witnesses to prove his penalty-phase *Strickland* claim. At the hearing, Williams called three family members to further detail Williams's troubled childhood.

Queenie Mae Peoples, Williams's half-sister, offered the following details:

- Williams's father whipped all of his children with a belt, Vol. 13 at 145-46;
- Williams's mother physically abused the children at her husband's direction, Vol. 13 at 138;

- Williams's father hit his wife with his fists and threatened her on different occasions with a knife and gun," Vol. 13 at 132;
- Williams's father sexually abused her (Queenie), Vol. 13 at 128;
- Williams's father throw his other son, Thomas, into a wall, Vol. 14 at 107;
- Williams's father once forced Williams to spend an entire day in a hole, Vol. 14 at 97.

Curtis Williams, Williams's paternal uncle, then testified that he observed Herbert Williams's childhood bruises presumably made by beatings from Williams's father. Vol. 14 at 58. Curtis Williams also testified that Herbert Williams's mother was routinely absent from home due to her involvement with the church. Vol. 14 at 57-61. Finally, Williams's paternal aunt, Deborah Perine, testified that Williams lived with his grandmother during his early years and that Williams looked up to his aunt (Ms. Perine) as a mother figure, Vol. 14 at 91-92.

Williams concluded with the testimony of a psychiatrist, Dr. Eliot Gelwan, who reviewed numerous records documenting Williams's life and interviewed Williams on several occasions. Dr. Gelwan testified that, in his opinion, Williams suffered from post-traumatic stress disorder (PTSD) at the time of the murder, as proved by the following:

- Williams's early traumatic experiences,
- Williams's lack of childhood relationships,
- Williams's reports of intrusive memories of childhood abuse,

- Williams's claim that he would avoid places where he remembered being abused,
- Williams's claim that he suffered from increased arousal, sleep difficulties, angry outbursts, and decreased concentration,
- Williams's departure from the Job Corps due to depression, and,
- Williams's (unsubstantiated) claims that he and Mr. Hasser were friends who dealt drugs together.

Vol. 14 at 97-115, 329-30.

In rebuttal, the State offered testimony from both of Williams's trial attorneys. One of the attorneys, James Lackey, testified that Williams had been evaluated by a psychiatrist, Dr. Clyde Van Rosen, prior to trial. Mr. Lackey testified that he did not present Dr. Van Rosen's testimony at the penalty-phase because it would not have been helpful to Williams's defense. In particular, Mr. Lackey explained that "basically, [Dr. Van Rosen's] report indicated that there was—that other than some borderline problems in intelligence and so on, that there was basically nothing wrong with Mr. Williams and that the testing was—felt was somewhat skewed by a lack of effort or attempts to confuse the tester by Mr. Williams." Vol. 13 at 66. Specifically, Dr. Van Rosen's pre-trial report concluded:

> During the evaluation, [Williams] did not show any significant signs of psychosis. The mental state at the time of the alleged crime is quite difficult to assess due to his varying stories, but there are no persuasive signs of a

> major psychotic disturbance which influenced his actions in any of his versions.

Vol. 13 at 68.

The State also offered its own expert psychologist, Dr. Karl Kirkland, to dispute Dr. Gelwan's PTSD diagnosis.[1] Dr. Kirkland testified that one of his areas of expertise was diagnosing PTSD and that he concluded that Williams did not suffer from, nor did he meet the diagnostic criteria for, PTSD. Vol. 14 at 193. The results of Dr. Kirkland's testing indicated that Williams had a normal profile with no evidence of a psychopathic condition. Vol. 14 at 178. Dr. Kirkland also testified that he conducted interviews with some of Williams' family members, and that Williams' uncle told him that the Williams' household was not a "violent home." Vol. 14 at 183.

Judge McRae rejected Williams's claim that trial counsel had been constitutionally ineffective for failing to discover and present the mitigation evidence presented by Williams's post-conviction attorneys under both *Strickland* elements (deficient performance and prejudice). *Williams*, 782 So. 2d at 825-29; App. 131a-140a. Because this petition focuses solely on the propriety of Judge McRae's prejudice determination, which was later adopted by the state appellate court as correct, we focus solely on that portion of his order.

Judge McRae determined that the failure to call Dr. Gelwan, Williams's post-conviction psychiatrist, at trial did not prejudice Williams for several

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[1]The Eleventh Circuit's opinion does not reference any of Dr. Kirkland's testimony, despite its role in the state courts's opinions.

reasons. First, Williams failed to prove Dr. Gelwan would have been available to testify at Williams's trial, which occurred in 1990. *Williams*, 782 So. 2d at 828; App. 136a-138a. Second, Judge McRae found that Dr. Gelwan's PTSD diagnosis was incredible when other mental health officials who interviewed Williams—including one hired by Williams's trial counsel—failed to reach the same conclusion. *Id.* at 827; App. 134a-136a. Third, Judge McRae determined that Dr. Gelwan's testimony was incredible (if not dubious) because it was based in part on Williams's unsubstantiated claims that he "was taken under a wing by Mr. Hasser" (*i.e.* the man he murdered for a car) and the pair bonded in a way that satisfied some of Williams's need for affiliation and belonging. *Id.* at 828; App. 136a-138a.

Concerning the failure to present the additional family members to discuss Williams's childhood, Judge McRae first reiterated the reasons he gave similar testimony from Williams's mother little weight at trial:

> The evidence regarding Williams's background was never found to have a causal relationship with Williams committing capital murder. In the sentencing order, this Court found that Williams 'purposely and deliberately' planned [the murder]. This court further stated in the sentencing order that 'the events which led to the murder of Timothy Hasser were not the product of chance; rather these events were planned and executed with a military-like precision. . . . Williams carried out his plan to take [Mr. Hasser's] Porsche by abducting the victim at gunpoint and killing him at a remote site

> and attempting to dispose of the body by throwing it into a river.

Williams, 782 So. 2d at 826-27; App. 133a-134a. Judge McRae then judged the weight to be given Williams's new, admittedly more-detailed, mitigation evidence:

> Any additional testimony offered by Williams at the Rule 32 evidentiary hearing that he was physically abused by his father *has little mitigation value* due to the fact that this was a deliberately planned crime where the victim was murdered because Williams wanted his car.

Id. at 827; App. 134a. (emphasis added). Relying on Eleventh Circuit precedent in similar murder-robbery cases,[2] Judge McRae concluded with *Strickland's* prejudice determination:

> Weighing the evidence presented by Williams at the evidentiary hearing against the aggravating circumstances that were proved beyond a reasonable doubt at the penalty phase of trial shows that trial counsel was not constitutionally ineffective. . . . In light of the gravity of the aggravating circumstances proven beyond a reasonable doubt in this case and the non-compelling nature of the mitigating evidence that Williams alleges trial counsel should have presented, the presentation of this evidence would not have resulted in this court passing

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[2]*See Francis v. Dugger*, 908 F.2d 696, 703-04 (11th Cir. 1990); *Thompson v. Wainwright*, 787 F.2d 1447, 1453 (11th Cir. 1986)

> down a sentence other than death. There is no reasonable probability that the sentencer would have concluded that the balance of aggravating and mitigating circumstances did not warrant a death sentence. Therefore, Williams is not prejudiced by trial counsel's failure to present the evidence that was presented at the Rule 32 evidentiary hearing, even if it had been available to him.

Id. at 829; App. 138a-140a.

On appeal, the Alabama Court of Criminal Appeals repeatedly cited the "two-pronged *Strickland* analysis" as governing its review. *Id.* at 822, 826, 829; App. 123a-125a, 132a-134a, 138a-140a.[3] The court adopted Judge McRae's eight-page *Strickland* findings in full, *id.* at 825-29; App. 131a-140a, and affirmed Judge McRae's findings that Williams failed to prove deficient performance or prejudice under *Strickland*. *Id.* at 829; App. 138a-140a. Thus, the Court of Criminal Appeals (1) considered Williams's post-conviction mitigation evidence in its weighing process, (2) assigned Williams's new evidence "little mitigation value," and (3) held that Williams failed to prove a reasonable probability that the sentencer—in this case, Judge McRae—would have reached a different sentencing outcome had Williams's trial attorneys presented the same evidence at trial. The Supreme Court of Alabama denied certiorari review. *See Ex parte Williams*, 782 So. 2d 842 (Ala. 2000).

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[3] The petitioner has included in the appendix the Alabama Court of Criminal Appeals's opinion that affirmed the denial of state post-conviction relief. *See Williams v. State*, 782 So. 2d 811 (Ala. Crim. App. 2000); App. 110a-166a.

D. Federal Court Proceedings

Under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), *see* 28 U.S.C. §2254(d) *et. seq.*, Williams sought federal habeas relief on the same penalty-phase *Strickland* claim, among others. Two of his arguments are relevant here.

First, Williams argued that the state courts generally erred in their finding of no *Strickland* prejudice. *Williams v. Haley*, __ F.3d __, 2006 WL 3075635, at *24 (S.D. Ala. Oct. 30, 2006); (App. 103a-106a). The district court determined that Williams failed to establish a "reasonable probability" that the trial sentencer (*i.e.* Judge McRae) would have reached a different conclusion, largely because Judge McRae witnessed and considered the new evidence during the state post-conviction proceedings and concluded that his sentence would not have changed had the new evidence been presented at trial. App. 103a-104a.

The second claim serves as the impetus to this petition. Relying on *Tennard v. Dretke*, 542 U.S. 274 (2004), in which this Court held the Fifth Circuit wrongly denied a certificate of appealability, Williams argued "that the state courts erroneously required that the petitioner show a 'nexus' between the mitigating evidence and the murder." App. 103a-104a. The district court rejected this claim for two reasons. First, not only did *Dretke* fail to "clearly establish" a rule of law beyond whether a certificate of appealability is warranted in certain circumstances, 28 U.S.C. § 2254(d), *Dretke* had yet to be decided when the state courts made their decision in Williams's case. App. 103a-104a. Second, the underlying issue in *Dretke* was whether a "nexus

requirement" in the Texas special instructions scheme prevented the sentencing jury from *considering* relevant mitigation. App. 104a-105a. *Dretke* did not address the situation presented here; that is, whether a nexus requirement can assist the sentencer in determining the *weight* to be given a mitigating circumstance that is being considered. *Id.* (Petitioner further details the relevance of the Texas "special issues" line of cases *infra*, pp. 26-28.) The district court denied Williams's habeas petition outright. App. 45a-109a.

The court of appeals reversed on the penalty-phase ineffectiveness claim, ruling that the Alabama Court of Criminal Appeals's decision was an unreasonable application of *Strickland's* deficient performance and prejudice elements. App. at 18a-38a.[4]

To grant §2254(d) relief under *Strickland's* prejudice element (*i.e.* the sole target of this petition), the court of appeals latched on to Williams's "nexus" argument: "We conclude that the Alabama court's emphasis on the absence of a 'causal relationship' between Williams's mitigating evidence and the statutory aggravator reflects an unreasonable application of *Strickland*." App. 34a-35a. To find its "clearly established" law, the court

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[4]The Eleventh Circuit's decision also reversed the federal district court's ruling that Williams's *Batson* claim was procedurally defaulted. App. at 38a-40a. The district court has subsequently filed an order considering and rejecting Williams' *Batson* claim on the merits. *Williams v. Haley*, 01-0777-CB-C, Doc. 78 (S.D. Ala. Oct. 20, 2008). Williams' motion to alter or amend that judgment, *see* Doc. 84, remains pending in the federal district court.

jettisoned Williams's reliance on *Dretke* and relied instead on this Court's decision in *Williams v. Taylor*, 529 U.S. 362 (2000). App. 34a-37a. According to the court of appeals, "[c]entral to the Court's holding in *Williams* was its conclusion that the Virginia Supreme Court failed to give sufficient weight to mitigating evidence that did not relate to the aggravating circumstance in the case-the petitioner's future dangerousness." App. 35a-36a. Applying its interpretation of *Williams's* "clearly established" precedent—*i.e.* that a state court must not only accept and consider mitigating evidence that does not extenuate the State's aggravating circumstance, it must give the evidence "sufficient weight"—the court held that

> Like the state court in [*Williams*], the Alabama court rested its prejudice determination on the fact that Williams's mitigating evidence did not undermine or rebut the evidence supporting the aggravating circumstance. . . . Thus, as in *Williams*, the court 'failed to evaluate the totality of the available mitigation evidence' in reweighing the aggravating and mitigating circumstances in this case. [citation omitted] This failure constitutes an unreasonable application of *Strickland*.

App. 36a-37a. The court denied the State's petition for rehearing *en banc* on November 13, 2008. App. 167a.

REASONS FOR GRANTING THE WRIT

In granting §2254 habeas relief, because the Alabama Court of Criminal Appeals attached "little"

weight to Williams's post-conviction mitigation evidence, the court of appeals crossed into territory this Court has historically reserved for the sentencer and state appellate courts. This Court has long distinguished between the outright exclusion of mitigating evidence and the weight it must be given:

- *Eddings v. Oklahoma*, 455 U.S. 104, 114-15 (1982): "The sentencer, and the Court of Criminal Appeals on review, may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration."

- *Barclay v. Florida*, 463 U.S. 939, 961 n.2 (1983): "Neither of these cases [*Eddings* or *Lockett v. Ohio*, 438 U.S. 586 (1978)] establishes the weight which must be given to any particular mitigating evidence, or the manner in which it must be considered; they simply condemn any procedure in which such evidence has no weight at all."

- *Harris v. Alabama*, 513 U.S. 504, 512 (1995)(citations and internal quotations omitted): "[T]he Constitution does not require a state to ascribe any specific weight to particular factors, either in aggravation or mitigation, to be considered by the sentencer. To require that 'great weight' be given to the jury recommendation here . . . would offend these established principles and place within constitutional ambit micro-management tasks that properly rest within the State's discretion to administer its criminal justice system."

In blurring the distinction between excluding and weighing mitigating evidence, the court of appeals "has decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). And the court's error is exacerbated because it occurred during a §2254 proceeding. *See Van Patten*, __ U.S. __, 128 S. Ct. 743; *Musladin*, 549 U.S. 70.

I. THE COURT OF APPEALS GRANTED §2254 RELIEF WITHOUT A BASIS IN "CLEARLY ESTABLISHED" FEDERAL LAW FROM THIS COURT.

While, in Petitioner's view, the court of appeals is wrong on the law—*i.e.* the constitution does *not* prohibit a sentencer or state appellate court from considering the extenuating nature of mitigating evidence when assigning weight—that is not the lower court's only error. Instead, the court of appeals' primary error, and the one that has warranted certiorari review in several cases of late, is that the court granted §2254 habeas relief without a case from this Court "clearly establish[ing]," 28 U.S.C. §2254(d)(1), that state courts are barred from considering the extenuating nature of mitigating evidence when determining its weight during a *Strickland* analysis. *See, e.g., Van Patten*, __ U.S. __, 128 S. Ct. 743 (2008)(reversing the grant of §2254 relief because no clearly established case law exists on the question of whether counsel's appearance by speaker phone violates the Sixth Amendment); *Musladin*, 549 U.S. 70 (2006)(reversing the grant of §2254 relief because no clearly established case law exists on the question of whether "spectator-conduct" can require reversal of a defendant's conviction).

Below, Petitioner first shows that this Court did not "clearly establish" such a rule in *Williams v. Taylor*, 529 U.S. 362 (2000), the case relied upon by the court of appeals. Petitioner then shows how the court of appeals' rule is inherently rejected by this Court's pre- and post-*Williams* precedent.

A. *WILLIAMS V. TAYLOR* DOES NOT "CLEARLY ESTABLISH" A RULE PRECLUDING A STATE COURT FROM CONSIDERING THE EXTENUATING NATURE OF MITIGATING EVIDENCE DURING ITS *STRICKLAND* ANALYSIS.

Again, this case arises from a state appellate court's determination of prejudice under *Strickland*. *Strickland* itself does not create guidelines on how mitigation evidence must be weighed; it simply establishes that mitigation evidence must be weighed against the State's aggravating evidence to determine whether a "reasonable probability" exists that the sentence "would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695. In fact, *Strickland* states that, as a general rule, "evidence about the actual process of decision, if not part of the record of the proceeding under review, and evidence about, for example, a particular judge's sentencing practices, should not be considered in the prejudice determination." *Id.*

Here, both Judge McRae and the Alabama Court of Criminal Appeals considered the entire body of Williams's new mitigating evidence in their prejudice inquiries:

Weighing the evidence presented by

> Williams at the evidentiary hearing against the aggravating circumstances that were proven beyond a reasonable doubt at the penalty phase of the trial shows that trial counsel was not constitutionally ineffective. . . . There is no reasonable probability that the sentencer would have concluded that the balance of aggravating and mitigating circumstances did not warrant a death sentence.

Williams, 782 So. 2d at 829; App. 138a-140a. Accordingly, the state courts' decisions were in no way "contrary to or an unreasonable application of" the law "clearly established" by *Strickland* itself. 28 U.S.C. §2254(d)(1).

To overcome this lack of "clearly established" caselaw to grant habeas relief, *see* 28 U.S.C. §2254(d)(1), the court of appeals latched onto the Court's decision in *Williams v. Taylor* for the proposition that, in applying *Strickland*, "the Virginia Supreme Court failed to give sufficient weight to mitigating evidence that did not relate to the aggravating circumstance in the case-the petitioner's future dangerousness." App. 35a-36a. According to the court of appeals, the Alabama Court of Criminal Appeals violated this principle when it assigned "little mitigation value" to Herbert Williams's new mitigation evidence because the evidence had no "causal relationship" with the purpose and manner of Williams's crime. App. 34a-37a. A review of the facts in *Williams*, however, shows that this Court did not "clearly establish" standards for assigning weight to particular types of mitigating circumstances in the midst of a

Strickland analysis.

In reversing the grant of state post-conviction relief to Terry Williams, the Virginia Supreme Court held that, to establish *Strickland* prejudice, a post-conviction petitioner must show both that (1) a "reasonable probability" exists that the petitioner's sentence would have been different if his new evidence had been presented at trial and (2) the petitioner's trial was "fundamentally unfair or unreliable" under *Lockhart v. Fretwell*, 506 U.S. 364 (1993). *Williams v. Warden*, 487 S.E.2d 194, 199-200 (Va. 1997). Applying this standard, the state supreme court held that the trial court improperly granted relief because the trial court adopted a "*per se* approach" of finding prejudice if any new mitigating evidence was found, regardless of whether petitioner's trial was unfair. *Id.* at 200.

This Court found fault with the state supreme court's decision for two reasons. First, the Court stated that attaching *Lockhart's* "fundamentally unfair or unreasonable" requirement onto *Strickland's* prejudice inquiry was an unreasonable application of *Strickland*. *Williams*, 529 U.S. at 397. Second, the Court disagreed that the state trial court had applied a "*per se* approach" to its weighing process; instead finding that the trial court properly considered the totality of the new mitigating evidence. *Id.* The error, according to this Court, lay with the state supreme court for (1) "fail[ing] to evaluate the totality of the available mitigation evidence," and (2) "fail[ing] even to mention the sole argument in mitigation that trial counsel did advance." *Id.* This failure to even consider the petitioner's new mitigation evidence/argument led to

the Court's only mention of weight: "The Virginia Supreme Court did not entertain that possibility [*i.e.* a jury might find Petitioner less morally culpable based on the new evidence]. It thus failed to accord appropriate weight to the body of mitigation evidence available to trial counsel." *Id.* In other words, because the state supreme court erred in its distinction between *per se* prejudice and prejudice under a "totality" of mitigation evidence, the state supreme court failed to consider the petitioner's new mitigation evidence.

Thus, to the extent *Williams* "clearly established" any law, it is only this: *Strickland's* prejudice inquiry (1) does not contain *Lockhart's* "fundamentally unfair or unreasonable" trial requirement and (2) requires consideration of the entire body of a petitioner's mitigating evidence, instead of a piecemeal or *per se* approach.

The state courts' application of *Strickland* met these requirements. Neither Judge McRae nor the Alabama Court of Criminal Appeals applied *Lockhart's* "fundamentally unfair" trial rule to Williams's *Strickland* claim, and both considered "the totality" of Williams's new mitigation evidence and his arguments in determining prejudice. *See Williams*, 782 So. 2d at 821-29; App. 122a-140a. Accordingly, the Eleventh Circuit erred in holding that the state courts unreasonably applied the "clearly established" *Strickland* principles adopted in *Williams v. Taylor*. And to the extent that Respondent will claim that the Court's one mention of "sufficient weight" in *Williams*, *id.* at 397, clearly established a constitutional weight requirement, the pre- and post-*Williams* cases outlined below dispel

that notion.

B. OTHER PRECEDENT FROM THIS COURT DISPELS A "CLEARLY ESTABLISHED" CONSTITUTIONAL WEIGHT REQUIREMENT.

That this Court has not clearly established a requirement that sentencers and state appellate courts turn a blind eye to the extenuating value of mitigating evidence, or that they are required to assign any particular amount of weight to pieces of mitigating evidence, is proved by other precedent from this Court. For example, in *Harris v. Alabama*, 513 U.S. at 512, this Court rejected a claim that Alabama courts must give "great weight" to the mitigating effect of a jury's recommended sentence. According to the Court, "settled is the corollary that the Constitution does not require a state to ascribe *any specific weight* to particular factors, either in aggravation or mitigation, to be considered by the sentencer." *Id.* (emphasis added.) Thus, "[t]o require that 'great weight' be given to the jury recommendation here . . . would offend these established principles and place within constitutional ambit micromanagement tasks that properly rest within the State's discretion to administer its criminal justice system." *Id.*

Petitioner has cited other cases establishing the same rule; that is, while the Constitution requires all relevant mitigating evidence be considered, it does not require a specific weight be assigned. *See supra* at pp. 16-17. Instead of rehashing the same citations again, Petitioner briefly outlines two lines of cases—both of which include pre- and post-*Williams v. Taylor* decisions—that put the exclusion versus

weight dichotomy into practice.

1. California's "Factor (k)"

The Court has dealt with sentencers and state courts considering the "extenuating" nature of mitigating evidence in three cases arising from California's "Factor (k)" instruction. *See Ayers v. Belmontes*, 549 U.S. 7 (2006); *Brown v. Payton*, 544 U.S. 133 (2003); *Boyde v. California*, 494 U.S. 370 (1990). Before 1983, California's instructions for considering mitigating evidence contained the following "catch-all" provision:

> You shall consider, take into account and be guided by the following factors, if applicable:
>
> . . .
>
> (k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.

California Jury Instructions, Criminal 8.85(k) (as quoted in *Boyde v. California*, 494 U.S. 370, 373 n.1 (1990)). California juries were instructed that a "circumstance which extenuates" under Factor (k) meant a mitigating circumstance that "lessen[s] the seriousness of a crime as by giving an excuse." *Boyde*, 494 U.S. at 381.

On every occasion, this Court has upheld challenges against instructions under "Factor (k)." In *Boyde*, the Court rejected Petitioner's argument that Factor (k) "precluded the jury from evaluating the 'absolute weight' of the aggravating circumstances" and determining whether, "in light of all the aggravating and mitigating evidence, death was the appropriate penalty." 494 U.S. at 376. The

Court held that, under the Factor (k) instruction, the jury was properly allowed to *consider* all of Petitioner's mitigating background evidence and "the requirement of individualized sentencing in capital cases is satisfied by allowing the jury to consider all relevant mitigating evidence." *Id.* at 377, 386 (quoting *Blystone v. Pennsylvania*, 494 U.S. 299, 307 (1990)).

In *Payton*, the Court reversed the granting of §2254 habeas relief when a prosecutor wrongly argued that Factor (k) precluded consideration of the defendant's post-crime behavior because it did not extenuate the defendant's crime. *See* 544 U.S. 133. As in *Boyde*, the Court predicated its opinion on the fact that the jury was allowed to *consider* all of the defendant's evidence.

In *Ayers*, the Court again upheld use of the Factor (k) instruction because the jury was not precluded from considering evidence of the defendant's post-crime religious conversion based on its lack of extenuating qualities. *See* 549 U.S. 7 (2006). The Court first noted that the "proper inquiry . . . is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the *consideration* of constitutionally relevant evidence." *Id.* at 13 (emphasis added). The Court then extensively quoted the prosecutor's argument to note that it was permissibly targeted at giving the conversion evidence little weight, not outright exclusion:

> Nothing the prosecutor said would have convinced the jury that it was forbidden from even considering respondent's religious

> conversion, though surely the jury could discount it; and nothing the prosecutor said would have led the jury to think it could not consider respondent's future potential, especially since he indicated that this is exactly what the jury had "to weigh" in its deliberation

Id at 17-18. Notably, the dissent's focus was not on the amount of weight given to non-extenuating mitigation evidence, but a concern that a Factor (k) instruction made it "much more likely than not that the jury believed that the law forbade it from giving that evidence any weight at all." *Id.* at 39 (Stevens, J. dissenting).

Petitioner's point is that each of the Court's Factor (k) cases, two of which arose under AEDPA after *Williams v. Taylor*, turned on whether non-extenuating mitigating evidence was allowed to be considered *at all*. Each opinion, in majority and dissent, assumed that a sentencer could assign whatever weight it pleased to non-extenuating evidence, as long as the sentencer was allowed to consider the evidence.

2. Texas's "Special Issues" Instructions

Further evidence of this exclusion versus weight dichotomy lies within the ebb-and-flow of the Court's review of Texas's "special issues" instructions. Unlike Alabama's weighing process, Texas submits "special issues" questions to a sentencing jury to determine whether the death penalty is warranted. *See* Tex. Code Crim. Proc. Ann., Art. 37.071 (Vernon 2006). Prior to a 1991 revision of the Texas Code, these questions opened the possibility that certain

types of mitigating evidence might not be considered by the jury; thus spawning a string of cases in this Court.

In *Penry v. Lynaugh*, 492 U.S. 302 (1989) (*Penry I*), the Court remanded for a new sentencing hearing due to "the absence of instructions informing the jury that it could consider and give effect to the mitigating evidence of Penry's mental retardation and abused background," *id.* at 328.

In *Graham v. Collins*, 506 U.S. 461 (1993), the Court affirmed Petitioner's death sentence because "[Petitioner] indisputably was permitted to place all of his [mitigating] evidence before the jury and both of [Petitioner's] lawyers vigorously urged the jury to answer 'no' to the special issues based on this evidence." *Id.* at 475. In distinguishing its previous cases, including *Lockett*, *Eddings*, and *Penry I*, the Court noted that, "[i]n those cases, the constitutional defect lay in the fact that relevant mitigating evidence was placed beyond the effective reach of the sentencer." *Id.*

In *Johnson v. Texas*, 509 U.S. 350 (1993), the Court affirmed Petitioner's death sentence because, under the facts of Petitioner's case, "there is no reasonable likelihood that the jury would have found itself foreclosed from considering the relevant [mitigating] aspects of Petitioner's youth" due to the special issues instructions. *Id.* at 368.

Finally, in *Brewer v. Quarterman*, 550 U.S. 286, 127 S.Ct. 1706 (2007) and *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 127 S.Ct. 1654 (2007), which were released on the same day, the Court reversed Petitioner's death sentence because the

special issues instructions allowed Petitioner's mitigating evidence to be used as a "two-edged sword" that affirmatively answered one of the special questions warranting a death sentence, without allowing the jury to consider the mitigating evidence as a reason to reject the death penalty by "weigh[ing] such evidence in its calculus of deciding whether a defendant is truly deserving of death." *Brewer*, 550 U.S. at __; 127 S.Ct. at 1714.

Again, Petitioner's point in raising these cases—two of which post-date *Williams v. Taylor*—is to show the continuous dividing line between (1) preventing the sentencer from considering mitigating evidence and (2) the weight mitigating evidence is to be given. Regardless of whether the Court granted relief (*Penry I*, *Brewer*, and *Abdul-Kabir*) or denied it (*Graham* and *Johnson*), the result in the *Penry*-line of cases always turned on whether the sentencer was "permitted to give meaningful effect or a 'reasoned moral response' to a defendant's mitigating evidence" or was instead "forbidden from doing so by statute or a judicial interpretation of a statute." *Abdul-Kabir*, 550 U.S. at __; 127 S.Ct. at 1675.

Not once—even after *Williams v. Taylor* was released—did the Court hint that reversal was a possibility if the sentencer was allowed to consider the full body of mitigating evidence and simply assigned certain pieces a lower weight. Nor does it appear this point was even argued. The most logical inference to be drawn is that *Williams v. Taylor* never changed the long-standing rule of this Court: "The sentencer, and the Court of Criminal Appeals on review, may determine the weight to be given relevant mitigating evidence. But they may not give

it no weight by excluding such evidence from their consideration." *Eddings*, 455 U.S. at 114-15.

C. THE COURT OF APPEALS'S DECISION CONFLICTS WITH THIS COURT'S RECENT §2254 REVERSALS.

As shown above, the Court has not "clearly established," 28 U.S.C. §2254(d)(1), a rule that forbids state appellate courts from taking into account the extenuating value of newly-presented mitigating evidence when determining whether that evidence establishes *Strickland* prejudice.

The Court has recently reversed two cases, one summarily, in which a court of appeals granted habeas relief in the absence of "clearly established" caselaw from this Court. *See, e.g. Van Patten*, __ U.S. __, 128 S. Ct. 743 (finding that no clearly established case law exists on the question of whether counsel's appearance by speaker phone violates the Sixth Amendment); *Musladin*, 549 U.S. 70 (finding no "clearly established Federal law" on the question of whether "spectator-conduct" can require reversal of a defendant's conviction). In several more cases, the Court has granted cert, vacated judgment, and remanded for further consideration in light of *Musladin's* holding. *See, e.g., Hudson v. Spisak*, __ U.S. , 128 S.Ct. 373 (2007); *Patrick v. Smith*, __ U.S. __, 127 U.S. 2126 (2007); *Knowles v. Mirzayance*, 549 U.S. 1199 (2007); *Miller v. Rodriguez*, 549 U.S. 1163 (2007). The Court is currently considering one of the *Musladin* GVR's after remand. *See Knowles v. Mirzayance*, No. 07-1315.

The Court's message is clear: Courts of appeals

cannot grant §2254 habeas relief without a basis in "clearly established" caselaw from this Court. *See* 28 U.S.C. §2254(d)(1). Because that is what happened here, certiorari review is warranted.

II. THIS CASE IS AN APPROPRIATE VEHICLE TO ANSWER AN IMPORTANT FEDERAL QUESTION.

Petitioner intentionally omits the fact-intensive question of the court of appeals' ruling under *Strickland's* deficient performance element. Petitioner does so to limit this petition to one, outcome determinative question: Has this Court "clearly established" a rule that bars state appellate courts from giving, during a *Strickland* prejudice analysis, "little mitigation value" to newly-presented mitigating evidence that fails to extenuate the facts of an inmate's crime? This question is outcome-determinative because, if the Court answers "no," the court of appeals' decision is due to be reversed because the state appellate court properly applied the *Strickland* reweighing process in determining that Williams failed to prove prejudice. *See* 28 U.S.C. §2254(d)(1). If the Court answers "yes," the court of appeals is due to be affirmed.

The question presented is worthy of certiorari review for two reasons. First, as shown in *Musladin* and *Van Patten*, enforcing the standards set forth by AEDPA is a necessary and important function of the Court. Second, states in the Eleventh Circuit are now faced with binding precedent that their courts must not only allow and consider new mitigating evidence during post-conviction proceedings, they must afford the new evidence a "sufficient weight" to

later be determined by a federal court under an amorphous standard. App. 34a-38a.

"Federalizing" the weighing process—that is, having federal courts review the process of assigning a particular weight to mitigating evidence during a post-conviction *Strickland* review—should be rejected here for the same reason the Court rejected a "great weight" requirement for jury recommendations in *Harris*: It "place[s] within constitutional ambit micromanagement tasks that properly rest within the State's discretion to administer its criminal justice system." *Harris*, 513 U.S. at 512. No two cases are alike, and the weight to be assigned any piece of aggravating and mitigating evidence will necessarily vary based on the facts of a particular case. Sentencers and state appellate courts should be given the freedom to conduct the weighing process on the facts of each individual case, without fear of federal second-guessing under AEDPA.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

Respectfully submitted,
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APPENDIX

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 07-11393

D. C. Docket No. 01-00777-CV-CB-C

HERBERT WILLIAMS, JR.,
Petitioner-Appellant,

versus

COMMISSIONER RICHARD F. ALLEN,
Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Alabama
(September 17,2008)

Before BIRCH, DUBINA and WILSON, Circuit Judges.

WILSON, Circuit Judge:

Herbert Williams, Jr., was convicted of capital murder for the 1988 killing of Timothy Hasser. An Alabama jury recommended by a vote of 9-3 that Williams be sentenced to life imprisonment without parole, but the trial judge overrode that recommendation and sentenced Williams to death. Following the completion of state postconviction proceedings, Williams filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Williams now appeals the district court's denial of that petition, arguing (1) that he was denied the effective assistance of counsel as to the penalty phase of his trial; (2) that the district court erred in finding his *Batson* v.

Kentucky claim unexhausted; and (3) that the district court improperly denied him an evidentiary hearing. After thorough review of the record, we affirm in part, reverse in part, and remand for further proceedings.

I. BACKGROUND

A. The Crime and Its Investigation

On November 2, 1988, Officer Mark Harrell of the Jackson, Alabama police department observed a white Porsche stopped in the emergency lane on the McCorquodale Bridge, approximately 80 miles north of Mobile. Officer Harrell stopped to provide assistance. The driver, nineteen-year-old Herbert Williams, Jr., told Harrell that he thought the car was running out of gas or was "a lemon," and asked the officer where a gas station was located. Officer Harrell followed Williams to a nearby station and became suspicious when he noticed a substance that appeared to be blood dripping from the vehicle's rear hatch. The officer also observed that Williams was having difficulty operating the vehicle because of its manual transmission.

Upon arriving at the gas station, Officer Harrell looked inside the Porsche and saw the blood-covered body of a white male lying in the back of the vehicle. Officer Harrell placed Williams in the back of his patrol car and returned to the Porsche, where he determined that the victim, later identified as Timothy Hasser, was deceased. Hasser had been shot in the head three times, and weights were tied to his ankles. After additional investigation, it was determined that Hasser was the owner of the Porsche. Officer Harrell read Williams his *Miranda* rights and placed him under arrest. Subsequently, Williams informed the police that a .38 caliber handgun containing his fingerprints was

located under the front seat of the Porsche. This gun was later identified as the murder weapon.

B. Trial and Direct Appeal

1. Guilt Phase

Williams was indicted for murder in the course of a robbery in violation of Ala. Code § 13A-5-40(a)(2) (1975). After Williams' first two court-appointed attorneys withdrew due to conflicts of interest, the court appointed James Lackey and James Wilson to represent him. Williams' trial commenced in February 1990 in the Circuit Court of Mobile County, Alabama.

During jury selection, Williams' counsel raised a *Batson* objection[1] based on the state's use of peremptory challenges to exclude four African Americans from the jury. At the direction of the court, the state provided explanations for each of these strikes. Upon hearing the proffered reasons, the court denied Williams' motion.

At trial, the state sought to establish that Williams and Hasser did not know each other and that Williams had targeted Hasser for his Porsche. In addition to the evidence described above, the state relied on various inconsistent statements that Williams had given the police following his arrest. The state also introduced physical evidence discovered at Williams' place of residence, including diary entries indicating that the murder and robbery were planned in advance. Additionally, a number of witnesses testified that Williams had told them prior to the murder that he

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[1] *See Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

would be getting a Porsche.

The defense's theory was that Hasser was murdered during the course of a drug deal gone awry. Defense counsel attempted to establish that Williams dealt drugs for Hasser, who had promised to give him the Porsche as payment. In support of this theory, the defense offered witness testimony suggesting that Williams and Hasser knew one another. In addition, the defense relied on handwritten documents discovered in the Porsche that purported to convey the car from Hasser to Williams. According to the defense, drug dealers shot Hasser after he and Williams drove to Creola for a drug transaction, and the dealers ordered Williams to dispose of the body.

On February 16, 1990, the jury returned a verdict finding Williams guilty of capital murder.

2. Penalty Phase

The penalty phase began immediately following the return of the verdict. The state presented no additional evidence. The defense offered one witness: Williams' mother, Arcola Williams. In brief testimony, Ms. Williams stated that her son lived primarily with his grandmother in Mobile until he was four years old, and was later sent to stay with an aunt in Leroy during the school year. At age six, Williams returned to live at his parents' home, where, according to Ms. Williams, his father, Herbert Williams, Sr., beat him "many times." Ms. Williams stated that "children have to be whipped sometimes," but that it "seem[ed] like he whipped him more than he should." When Williams was a teenager, his father "beat him from time to time with his fists." Ms. Williams described one incident in which her husband took Williams into a bedroom and was "pretty

rough with him," though she noted that she was not in the room. Afterwards, her son called the police from a neighbor's house and said his father "had choked him and did everything to him while he was in there."

Ms. Williams further testified that while Williams was growing up, her husband drank heavily, used marijuana, and beat her in their son's presence. She concluded her testimony by stating that her husband was presently incarcerated for molesting and raping the couple's mentally retarded daughter.

Following deliberations, the jury returned with a recommendation that Williams be sentenced to life in prison without parole. The vote consisted of nine jurors in favor of life without parole, and three in favor of death.

The court set a sentencing hearing for April 11, 1990, and ordered a presentence investigation report (PSI). During the sentencing hearing, neither the state nor the defense presented additional evidence. In their argument to the court, defense counsel relied on the mitigating factors that they had raised previously, as well as the PSI, which stated that Williams' mother "has an excellent reputation in the Thomasville area." The judge responded: "I don't think anyone . . . would question that his mother has an excellent reputation and that his mother and grandmother are extremely good people." At the conclusion of the hearing, the judge requested a proposed order for each of the two possible sentences, noting that he "just need[ed] to think about it more."

On April 26, 1990, the court sentenced Williams to death. Of the eight statutory aggravating circumstances available under Alabama law, the court

found the existence of one: that the murder was committed while the defendant was engaged in the commission of a robbery. *See* Ala. Code § 13A-5-49(4). In addition, the court stated that it attached "great significance to the calculated precision with which this crime was planned and systematically executed. The Defendant's diary manifests a greed and depravity of mind characteristic of an individual who has an utter disregard for human life and the rights and property of others."

The court found a total of three mitigating circumstances-two statutory and one non-statutory. The statutory mitigators were Williams' lack of prior criminal activity, *see id.* § 13A-5-51(1), and his youth at the time of the offense, *see id.* § 13A-5-5l(7). As to the latter, however, the court stated: "The reptilian coldness with which this criminal act was devised and perpetrated vitiates any contention that the innocence of youth was a factor in the murder of Timothy Hasser." The non-statutory mitigator was the court's finding "that the Defendant's father was violent and abusive towards him as a child." The court concluded, however, that "[t]his fact . . . makes the Defendant no less accountable for his action." Furthermore, the court stated, Williams' upbringing did not lack positive aspects: "The court . . . considered that the Defendant's mother and grandmother testified in his behalf. Both appeared to be decent people who genuinely cared for the Defendant. It, therefore, would strain credulity to find that the Defendant's background was one of total

deprivation."[2]

In addition to these mitigating factors, the court stated that it gave "very serious consideration and substantial weight" to the jury's recommendation of life imprisonment. However, the court determined that "the aggravating circumstance in this case outweighs the mitigating circumstances," and therefore "the punishment should be death notwithstanding the jury's contrary recommendation."

3. Direct Appeal

Williams' trial attorneys withdrew from the case after sentencing, and new counsel was appointed to represent him on appeal. On August 27, 1993, the Alabama Supreme Court affirmed Williams' conviction and sentence. *Ex parte Williams,*627 So. 2d 999 (Ala. 1993). The United States Supreme Court denied certiorari on March 28, 1994. *Williams v. Alabama,* 511 U.S. 1012, 114 S. Ct. 1387, 128 L. Ed. 2d 61 (1994).

C. Rule 32 Proceedings

Pursuant to Rule 32 of the Alabama Rules of Criminal Procedure, Williams filed a petition for post-conviction relief in the Circuit Court of Mobile County. Among Williams' claims was the contention that his trial attorneys rendered constitutionally defective assistance by failing to investigate and present mitigating evidence relating to his background.

1. Evidentiary Hearing

In June and July of 1997, an evidentiary hearing on

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[2] Williams' grandmother, Evelyn Eaton, testified during the guilt phase.

Williams' Rule 32 petition was held before the same judge who had presided at trial. At the hearing, Williams sought to establish his ineffective assistance claim through the testimony of several witnesses who did not testify at trial. Three of these witnesses were family members who said they would have been willing to testify at that time but were never contacted by Williams' attorneys. Williams also presented testimony from a psychiatrist who reported the results of an extensive investigation into Williams' background and psychological history. In addition, Williams relied on testimony from his two trial attorneys, James Wilson and James Lackey.[3]

Williams' half-sister, Queenie May Patterson Peoples, testified in stark detail about the nature and extent of the abuse that occurred in Williams' home during his upbringing. She testified that the beatings perpetrated by Williams Sr. began when Williams was a small child and involved an extreme level of violence. During Williams' early childhood, Peoples stated, his father would hold him in the air with one arm and repeatedly whip him with a thick belt until he was too exhausted to continue. He would then "switch sides" and resume whipping with his other arm. She stated that this type of abuse continued "until we were old enough that we could . . . move about a lot. Then they make you lay in the bed." As an additional example of Williams Sr.'s cruelty, Peoples described an incident in which he forced Williams, who was then a small boy, to

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[3] During the hearing, Williams offered testimony from a number of additional witnesses, including Arcola Williams. Much of this testimony involved claims that are not before us on appeal.

spend an entire day in a hole dug for a septic tank.

Peoples also discussed a number of instances in which Williams witnessed his father viciously attack his mother or siblings. Peoples testified that it was "a regular thing in our household" for Williams Sr. to "use[] my mother as a punching bag" and that Williams Sr. gave his wife "busted lips and black eyes and bruises" that were apparent to Williams. On one occasion, Williams Sr. struck his wife in the mouth so hard that he broke the bridge of her false teeth. Peoples noted that several of these beatings took place while Arcola Williams was pregnant with Williams' younger brother Thomas. During that time, Williams Sr. "would knock her down in [sic] the floor . . . . He would hit her in the stomach. He would kick her and knock her down and it was my opinion that he was trying to make her lose the baby because he did not believe it was his." Later, when Thomas was two, Williams Sr. became enraged after discovering that the child had apparently eaten his stash of marijuana. Williams Sr. began beating Thomas with his belt, and when Thomas would not stop crying, Williams Sr. threw him against a wall. After that incident, Thomas did not speak again for four years.[4]

Peoples testified that Williams Sr.'s abusive acts frequently involved the use of weapons. In one incident that occurred while Williams was present in the home, Williams Sr. threatened to decapitate his wife:

> They got into an argument and he told my mother that he was going to kill her and he

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[4] Additional Rule 32 testimony indicated that Thomas was subsequently diagnosed as having abnormal brain functioning.

> made her get down on her knees, hands and knees, and hold her head out, and he had this-this long knife. It was bigger than a butcher knife, but it was shorter than a regular size machete, and he said he was going to cut her head off, and . . . I ran outside and he came outside and got me and brought me back in the house and sent me to my room. So, while I was in my room I let the window up and I jumped out the window and I went next door and called the cops because I really believed that he would do it.

Peoples described another incident in which Williams witnessed his father throw a pair of scissors at her; the scissors missed their target and "went into the wall." On another occasion, Williams Sr. broke a Coca-Cola bottle over Arcola Williams' head. Peoples also described two instances in which Williams Sr. fired guns during arguments with his wife.

According to Peoples, Arcola Williams did little to protect her children from Williams Sr.'s abuse. Peoples stated that their mother "never did or never said anything" when Williams Sr. was beating Williams. When Peoples told her mother that Williams Sr. was sexually abusing her, Arcola Williams did not come to her defense: "She took him to his word. She never told us that she believed us for anything that we said. She always took his side."[5]

Moreover, Peoples testified, Arcola Williams herself

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[5] The Rule 32 testimony indicated a history of incest within the family. According to Peoples, she was told that she was the product of her maternal grandfather's rape of his daughter, Arcola Williams.

was physically abusive toward her children. Peoples said that their mother would beat them at Williams Sr.'s direction, using belts or other instruments. In doing so, Arcola Williams took steps to ensure that the resulting bruises would not be visible to others: "[S]he would make us pull off all our clothes except for our underwear and we had to lay down across the bed, face down, because they didn't believe in hitting in the front because they would show bruises and people would know. So, we had to lay face down and they would take the belt or whatever and just whip us from the back."

Williams next offered testimony from Curtis Williams, his uncle. Curtis Williams recalled observing bruises on Williams when the latter was a child, and said that Williams told him he had been beaten by his father. In addition, he testified that Arcola Williams was consistently absent during Williams' childhood because of her extensive involvement with her church. As a result, she failed to attend to the ongoing problems in the home, where "the family structure [broke] down." When she was at home, Ms. Williams was unable to protect her children from her husband's abuse, largely because she feared being attacked herself. In order to escape the situation, Williams visited Curtis Williams in Mobile at every possible opportunity.

Deborah Perine, Williams' aunt, provided brief testimony concerning the period during Williams' early childhood when he lived with his grandmother, Evelyn Eaton. Perine assisted Eaton in raising Williams from the time he was an infant until he was approximately two years old. In testimony suggesting that Arcola Williams was rarely present during that period, Perine stated that Williams believed that she, Perine, was his

mother.

Williams' also offered testimony from Dr. Eliot Gelwan, a psychiatrist specializing in psychopathology and differential diagnosis. Dr. Gelwan conducted a thorough investigation into Williams' background, relying on a wide range of data sources. He conducted extensive interviews with Williams and with fourteen other individuals who knew Williams at various points in his life. In addition, he reviewed a variety of documents, including Williams' educational, employment, and medical records; police reports complied after his arrest; and the psychological evaluation reports prepared prior to trial.

Based on these sources of information, Dr. Gelwan concluded that Williams experienced "an extreme brutalizing exposure to trauma" that began upon his return from his grandmother's home at age four and continued until he left his parents' home at age seventeen or eighteen. During those years, Williams suffered or witnessed beatings on a regular basis, generally several times a week. Echoing Peoples' testimony, Dr. Gelwan described a number of instances of particularly severe abuse. For example, shortly after Williams returned home from Job Corps at age seventeen, his father broke a chair over his head. Dr. Gelwan also reported that Williams had memories of his father beating his mother while she was pregnant with Williams' younger siblings. In one such incident, which occurred when Williams was four or five, Williams Sr. repeatedly struck his wife in the stomach

until she vomited.[6]

Dr. Gelwan also testified that Williams' childhood was characterized by extreme neglect and deprivation. He noted that Williams' mother would leave him unsupervised from the time he was four or five, and that Williams would roam the neighborhood alone. The situation was exacerbated by Ms. Williams' involvement with her church. In addition to spending significant amounts of time there, Ms. Williams made large financial donations to the church. As a result, Williams and his siblings frequently ate handouts or leftovers from her job. Dr. Gelwan also noted that Williams was provided very little in the way of adequate clothing, even by the standards of the poor community in which he lived.

Providing further evidence of neglect, Dr. Gelwan testified as to the lack of attention given to Williams' hygiene and medical needs. He noted that no one supervised Williams' cleanliness as a child. Indeed, Williams was unaware that people brushed their teeth on a daily basis until he was incarcerated at age nineteen. Nor did Williams receive proper medical attention for his injuries. Dr. Gelwan described an instance in which Williams suffered a severe laceration on his arm that went to the bone. This injury was treated at home, and the bandage was left unchanged and unexamined for several weeks.

In addition, Dr. Gelwan testified that Williams suffered emotional neglect. He found that there was an

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[6] Dr. Gelwan noted that medical records for Williams' younger sister Mabel indicated signs of fetal distress. As noted, Mabel Williams was diagnosed as being mentally retarded.

almost total lack of parental functioning in the Williams household, to the point that Williams could be characterized as "someone who never had effective parents." In contrast to the trial court's assessment, Dr. Gelwan described Arcola Williams as a neglectful and abandoning mother. Her unavailability, Dr. Gelwan believed, contributed to a "catastrophic collapse" in Williams' academic performance that led to his having to repeat the fourth grade. Williams' isolation was intensified when the family relocated to a remote part of Thomasville where there were no neighbors---a move that occurred after the family's previous landlord asked them to leave because of frequent police visits in response to domestic violence complaints. In that isolated location, Williams had few peer relationships and few activities outside the home. Dr. Gelwan characterized the situation as one of "on-going captivity," from which Williams' only escape was to "go off deep into the woods and be alone." For a time, Williams played football, but his father ended his involvement in that activity.

Additionally, Dr. Gelwan discussed Williams' history of clinical depression. Williams' Job Corps records indicated that he was hospitalized with serious depression, which ultimately forced him to withdraw from the program. He was prescribed an antidepressant medication and was sent home with the recommendation that he receive follow-up treatment.

In addition to these witnesses, the Rule 32 court heard testimony from Wilson and Lackey, who represented Williams at trial. Wilson recalled that Lackey was responsible for gathering information for the sentencing phase because he, Wilson, had never handled a capital trial. Lackey testified that he did not

recall trial counsel doing anything in preparation for sentencing "that we hadn't already done." He did not recall interviewing any of Williams' family members, with the possible exception of "his mother or an aunt or something." Lackey also could not recall talking to a defense psychologist, Dr. C. Van Rosen, prior to the latter's evaluation of Williams. Nor did he recall any effort by trial counsel to investigate a statement in Dr. Rosen's report concerning the possibility of a drug abuse diagnosis. Overall, Lackey said, he "was not doing much of anything other than legal research" and non-witness-related trial preparation.

Upon questioning by the state, Lackey testified that he and Wilson declined to use Dr. Rosen's report because, in his recollection, it indicated "that there was nothing basically wrong with Mr. Williams." As a result, Lackey said, it was determined that Dr. Rosen's testimony would not be very helpful at either the guilt phase or the sentencing phase.

2. Disposition of Petition

On January 27, 1999, the court entered an order denying relief on Williams' Rule 32 petition. With respect to the ineffective assistance claim, the court rejected the argument that trial counsel's failure to present additional evidence of abuse and neglect constituted deficient performance. The court held that Williams' attorneys were not required to present additional evidence beyond that which they offered at sentencing.

Additionally, the court found that trial counsel's failure to present mental health evidence did not constitute deficient performance. The court noted that Williams was evaluated by Dr. Rosen before trial, but

his attorneys declined to use the psychologist's testimony because they determined it would not be helpful. The court also rejected Williams' argument on the ground that he failed to establish that Dr. Gelwan would have been available to testify at his trial in 1990. In addition, the court determined that Dr. Gelwan's mental health findings lacked credibility.

Finally, the court held that Williams was not prejudiced by trial counsel's failure to offer additional evidence. The court found that the evidence concerning Williams' background had little mitigation value because it "was never found to have a causal relationship" with the commission of the crime. The court thus found no reasonable probability that the presentation of the additional evidence would have resulted in a sentence other than death.

The Alabama Court of Criminal Appeals affirmed in an order adopting the trial court's analysis of the ineffective assistance claim. *Williams v. State*, 782 So. 2d 811, 821-29 (Ala. Crim. App. 2000). The Alabama Supreme Court denied certiorari on November 9, 2000. *Ex parte Williams*, 782 So. 2d 842 (Ala. 2000).

D. Federal Habeas Proceedings

On November 8, 2001, Williams filed a 28 U.S.C. §; 2254 petition for writ of habeas corpus in the Southern District of Alabama. He amended his petition on July 31, 2002. In addition to the ineffective assistance claim, Williams raised several additional grounds for relief, including the contention that the prosecutor violated *Batson* by utilizing peremptory challenges in a racially discriminatory manner. Williams also sought an evidentiary hearing on the ground that the trial judge's conduct during the Rule 32 proceedings deprived him of

a full and fair hearing.

In March 2006, the district court dismissed several of Williams' claims as procedurally defaulted, and denied his request for an evidentiary hearing. On October 30, 2006, the court entered an order denying relief on Williams' remaining claims. Subsequently, the court granted a certificate of appealability as to three issues: (1) whether the Alabama court's denial of Williams' ineffective assistance claim based on the failure to investigate and present mitigating evidence was an unreasonable application of clearly established federal law; (2) whether consideration of Williams' *Batson* claim was barred by the doctrines of exhaustion and procedural default; and (3) whether an evidentiary hearing was required.

II. DISCUSSION

A. Ineffective Assistance of Counsel Claim

Williams argues that he was unconstitutionally denied the effective assistance of counsel as a result of his trial counsel's failure to investigate and present reasonably available mitigating evidence concerning his background. This evidence, he argues, would have demonstrated (1) that Williams suffered severe neglect and deprivation; (2) that Arcola Williams abused Williams and facilitated abuse by her husband; (3) that Williams' father employed weapons and other forms of physical brutality against his family throughout the time Williams lived at home; and (4) that, as a result of these experiences, Williams had a history of psychological problems.

"When examining a district court's denial of a § 2254 habeas petition, we review questions of law and

mixed questions of law and fact *de novo*, and findings of fact for clear error." *Grossman v. McDonough*, 466 F.3d 1325, 1335 (11th Cir. 2006) (citation omitted). "An ineffective assistance of counsel claim is a mixed question of law and fact subject to *de novo* review." *McNair v. Campbell*, 416 F.3d 1291, 1297 (11th Cir. 2005).

Because Williams' habeas petition was filed after April 24, 1996, his claims are governed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). *Id.* Under AEDPA's "highly deferential" standard of review, *Parker v. Sec'y for Dep't of Corr.*, 331 F.3d 764, 768 (11th Cir. 2003), a federal court may not grant habeas relief with respect to any claim adjudicated on the merits in state court unless the state court's adjudication "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). The statutory phrase "clearly established Federal law" "refers to the holdings, as opposed to the dicta, of [the Supreme] Court's decisions as of the time of the relevant state-court decision." *Williams v. Taylor*, 529 U.S. 362, 412, 120 S. Ct. 1495, 1523, 146 L. Ed. 2d 389 (2000).

Williams argues that he is entitled to relief under the "unreasonable application" clause of § 2254(d). A federal habeas court may grant relief under that provision "if the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the

facts of the prisoner's case." *Id.* at 413, 120 S. Ct. at 1523. "The focus of [this] inquiry is on whether the state court's application of clearly established federal law is objectively unreasonable." *Bell v. Cone,* 535 U.S. 685, 694, 122 S. Ct. 1843, 1850, 152 L. Ed. 2d 914 (2002). "[A]n unreasonable application is different from an incorrect one," and "a federal habeas court may not issue the writ 'simply because that court concludes in its independent judgment that the relevant state- court decision applied clearly established federal law erroneously or incorrectly.'" *Id.* (quoting *Williams,* 529 U.S. at 411, 120 S. Ct. at 1522). However, AEDPA does not "prohibit a federal court from finding an application of a principle unreasonable when it involves a set of facts 'different from those of the case in which the principle was announced.' The statute recognizes, to the contrary, that even a general standard may be applied in an unreasonable manner." *Panetti* v. *Quarterman,--- U.S.* ---, 127 S. Ct. 2842, 2858, 168 L. Ed. 2d 662 (2007) (citation omitted) (quoting *Lockyer v. Andrade,* 538 U.S. 63, 76, 123 S. Ct. 1166, 1175, 155 L. Ed. 2d 144 (2003)).

The Supreme Court established the legal principles governing ineffective assistance claims in *Strickland v. Washington,* 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). *Wiggins v. Smith,* 539 *U.S.* 510, 521, 123 S. Ct. 2527, 2535, 156 L. Ed. 2d 471 (2003). "An ineffective assistance claim has two components: A petitioner must show that counsel's performance was deficient, and that the deficiency prejudiced the defense." *Id.* (citing *Strickland,* 466 U.S. at 687, 104 S. Ct. 2052).

Bearing these principles in mind, we consider whether the Alabama courts' rejection of Williams'

ineffective assistance claim constituted an unreasonable application of *Strickland*. We address the performance and prejudice factors in turn.

1. Deficient Performance

To establish deficient performance, a petitioner must demonstrate that counsel's representation "fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688, 104 S. Ct. at 2064. The Supreme Court has "declined to articulate specific guidelines for appropriate attorney conduct and instead [has] emphasized that '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" *Wiggins*, 539 U.S. at 521, 123 S. Ct. at 2535 (second alteration in original) (quoting *Strickland*, 466 U.S. at 688. 104 S. Ct. at 2052). In applying this standard, we "'indulge [the] strong presumption' that counsel's performance was reasonable and that counsel 'made all significant decisions in the exercise of reasonable professional judgment.'" *Chandler v. United States*, 218 F.3d 1305, 1314 (11th Cir. 2000) (en banc) (alteration in original) (quoting *Strickland*, 466 U.S. at 689-90, 104 S. Ct. at 2065-66). Accordingly, a petitioner seeking to establish deficient performance bears a heavy---albeit not insurmountable-burden of persuasion. *Id.*

In this case, the claim of deficient performance is based on trial counsel's failure to investigate and present mitigating evidence concerning Williams' background. We have recognized that "[a]n attorney has a duty to conduct a reasonable investigation, including an investigation of the defendant's background, for possible mitigating evidence." *Porter v. Singletary*, 14 F.3d 554, 557 (11th Cir. 1994) (citation

omitted). This duty does not necessarily require counsel to investigate every evidentiary lead. *Harris v. Dugger*, 874 F.2d 756, 763 (11th Cir. 1989). However, the decision to limit an investigation "must flow from an informed judgment." *Id.* Under *Strickland*, "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." 466 U.S. at 690-91, 104 S. Ct. at 2066. Therefore, "[i]n assessing the reasonableness of an attorney's investigation, . . . a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Wiggins*, 539 U.S. at 527, 123 S. Ct. at 2538.

In arguing that his trial counsel's investigation of mitigating evidence in his background fell short of prevailing professional norms, Williams relies principally upon the Supreme Court's decision in *Wiggins*.[7] The petitioner in that case was convicted of

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[7] The district court held that AEDPA precludes reliance on *Wiggins*. Because that case was decided after the denial of Williams' Rule 32 petition became final, the district court concluded that it is not "clearly established Federal law" under § 2254(d)(1). We disagree.

This question was analyzed thoroughly in our recent decision in *Newland v. Hall*, though the relevant portion of the opinion expressed the views of only one judge. 527 F.3d 1162, 1195-1201 (11th Cir. 2008) (opinion of Tjoflat, J.). In *Newland*, Judge Tjoflat concluded that *Wiggins*, as well as the Supreme Court's decisions in *Williams* and *Rompilla* v. *Beard*, 545 U.S. 374, 125 S. Ct. 2456, 162 L. Ed. 2d 360 (2005), are not "new law" for purposes of the retroactivity principles of *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989). *See Newland*, 527 F.3d at 1197. Based on that conclusion, Judge

capital murder. His attorneys' investigation into mitigating evidence drew from three sources: reports prepared for the defense by a psychologist; a PSI containing vague indications of Wiggins' troubled background; and Department of Social Service (DSS) records documenting Wiggins' various foster care placements. *Id.* at 523, 123 S. Ct. at 2536. Despite having this information, Wiggins' counsel introduced no evidence concerning his life history during the sentencing hearing. *Id.* at 515, 123 S. Ct. at 2532. The jury sentenced Wiggins to death. During state postconviction proceedings, Wiggins presented

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Tjoflat determined that although the relevant state court decision in *Newland* was issued before *Wiggins* and *Rompilla*, the latter two decisions still constituted "clearly established Federal law" under AEDPA. *Id.* at 1200; *see Williams*, 529 U.S. at 412, 120 S. Ct. at 1495 ("[W]hatever would qualify as an old rule under our *Teague* jurisprudence will constitute 'clearly established Federal law, as determined by the Supreme Court of the United States' under § 2254(d)(l).").

Judge Tjoflat's conclusions are consistent with the Supreme Court's own characterization of its decisions. *See Wiggins*, 539 U.S. at 522, 123 S. Ct. at 2535-36 (explaining that the Court "made no new law" in resolving ineffective assistance claim in *Williams*, but instead "applied the same 'clearly established' precedent of *Strickland we apply today*" (emphasis added)). Moreover, we have relied upon *Wiggins* in reviewing a state court decision denying postconviction relief, notwithstanding that *Wiggins* was handed down after the state court decision at issue. *See Callahan v. Campbell*,427 F.3d 897, 935 (11th Cir. 2005). We thus have recognized implicitly that *Wiggins* did not create new law, but rather applied the underlying principles of *Strickland* to a different factual scenario.

Accordingly, we conclude that AEDPA presents no bar to Williams' reliance on *Wiggins*. As an "old rule" under *Teague*., that decision constitutes clearly established federal law within the meaning of § 2254(d)(1). *See Newland*, 527 F.3d at 1201.

testimony from a social worker who had prepared an elaborate social history report on Wiggins' background. The report contained evidence that Wiggins suffered severe physical and sexual abuse at the hands of his mother and while in the care of a series of foster parents. *Id.* at 516-17, 123 S. Ct. at 2532-33.

The Supreme Court held that the decision of Wiggins' trial counsel not to expand the scope of their investigation into his background fell short of prevailing professional standards. The Court concluded that Wiggins' counsel "abandoned their investigation into petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of sources." *Id.* at 524, 123 S. Ct. at 2537. The Court also found the scope of the investigation to be unreasonable "in light of what counsel actually discovered in [Wiggins'] DSS records." *Id.* at 525, 123 S. Ct. at 2537. These documents revealed evidence concerning, among other things, Wiggins' mother's alcoholism, his history of emotional difficulties, and the fact that he had experienced severe deprivation. *See id.*

The Court further held that the state appellate court's application of *Strickland's* governing legal principles was objectively unreasonable. *Id.* at 527, 123 S. Ct. at 2538. Rather than assessing whether it was reasonable for trial counsel to cease all investigation after obtaining the PSI and DSS records, the state court merely assumed that the investigation was adequate. *Id.* The state court also unreasonably applied *Strickland* by deferring to counsel's "strategic decision" regarding mitigation evidence, "despite the fact that counsel based this alleged choice on what we have made clear was an unreasonable investigation." *Id.* at 528, 123 S. Ct. at 2538.

In this case, trial counsel's investigation into mitigating evidence was similar in scope to the investigation at issue in *Wiggins*. As in *Wiggins*, trial counsel's sentencing phase preparation drew upon three sources of information. First, counsel had access to the report prepared by Dr. Rosen, the defense psychologist. Dr. Rosen conducted a psychological examination of Williams for the purpose of determining his competency to stand trial and his mental state at the time of the offense. Dr. Rosen's report stated, among other things, that Williams had an IQ of 83, exhibited signs of a personality disorder and depression, and was a possible suicide risk. The report did not, however, provide any information as to Williams' social history. Moreover, the report stated that the only information obtained on that topic came from interviews with Williams himself. Second, counsel had access to the PSI, which briefly noted Williams' description of his father as "a long-term alcoholic" who "frequently abused [Williams'] mother and children in the family." The PSI also noted that Williams had talked to a psychologist three times while in Job Corps, and had also seen a psychologist in Alabama. Finally, trial counsel interviewed Williams' mother, Arcola Williams.

We conclude that trial counsel's failure to broaden the scope of their investigation beyond these sources was unreasonable under prevailing professional norms. In assessing the reasonableness of an attorney's performance, the Supreme Court has looked to standards promulgated by the American Bar Association (ABA) as appropriate guides. *See Wiggins*, 539 U.S. at 524, 123 S. Ct. at 2536-37. The ABA standards pertaining to capital defense work in 1990

provided that a sentencing phase investigation "should comprise efforts to discover all reasonably available mitigating evidence." ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(C) (1989). As part of these efforts, counsel had a duty to collect information pertaining to "family and social history (including physical, sexual or emotional abuse)," and to "obtain names of collateral persons or sources to verify, corroborate, explain and expand upon [the] information obtained." *Id.*, 11.4.1(D). The Guidelines do not establish a specific number of persons who should be interviewed, and indeed we have rejected the idea that there is a "magic number" of witnesses from whom an attorney is required to seek mitigating evidence. *Alderman v. Terry*, 468 F.3d 775, 792 (11th Cir. 2006). However, we have found deficient performance in cases where an attorney's efforts to speak with available witnesses were insufficient "to formulate an accurate life profile of [the] defendant." *Jackson v. Herring*, 42 F.3d 1350, 1367 (11th Cir. 1995). *See, e.g., Dobbs v. Turpin*, 142 F.3d 1383, 1388 (11th Cir. 1998) (finding deficient performance where counsel failed to interview potential witnesses who could have testified regarding defendant's unfortunate childhood); *Jackson*, 42 F.3d at 1364 (finding deficient performance where counsel failed to interview anyone in defendant's family and thus failed to discover mitigating evidence in defendant's background); *Armstrong v. Dugger*, 833 F.2d 1430, 1432- 33 (11th Cir. 1987) (finding deficient performance where counsel's investigation of mitigating evidence consisted of single conversation with defendant and his parents, and another conversation with defendant's parole officer). Here, despite the availability of several of Williams' family members, trial counsel sought

mitigating evidence from only one person with firsthand knowledge of his background: his mother. By choosing to rely entirely on her account, trial counsel obtained an incomplete and misleading understanding of Williams' life history.

Furthermore, the information that trial counsel did acquire would have led a reasonable attorney to investigate further. *See Wiggins*, 539 U.S. at 527, 123 S. Ct. at 2538. Trial counsel knew from speaking with Arcola Williams that the defendant had experienced abuse as a child. In addition, they had possession of the PSI, which indicated (albeit in a cursory fashion) that Williams, his siblings, and his mother were abused by Williams Sr. The PSI further noted Williams' history of psychological problems and his repeated efforts to obtain treatment. Finally, counsel had available Dr. Rosen's report, which indicated that Williams showed "considerable depression, a very poor self-esteem, the possibility of a suicide risk and [a] tendency toward distorting reality." As was true in *Wiggins*, "any reasonably competent attorney would have realized that pursuing these leads was necessary to making an informed choice among possible defenses, particularly given the apparent absence of any aggravating factors in petitioner's background." 539 U.S. at 525, 123 S. Ct. at 2537.

A reasonable investigation into the leads in this case should have included, at a minimum, interviewing other family members who could corroborate the evidence of abuse and speak to the resulting impact on Williams. Counsel, however, failed to contact such witnesses. We have recognized in similar circumstances that such failure is indicative of deficient performance. *See, e.g., Jackson*, 42 F.3d at

1367 (finding deficient performance where counsel "had a small amount of information regarding possible mitigating evidence regarding [defendant's] history, but . . . inexplicably failed to follow up with further interviews and investigation"); *Elledge v. Dugger*, 823 F.2d 1439, 1445 (11th Cir. 1987) (per curiam) (finding deficient performance where defendant made counsel aware of abusive background, but counsel "did not even interrogate [defendant's] family members to ascertain the veracity of the account or their willingness to testify"), *withdrawn in part on denial of reh'g*, 833 F.2d 250 (en banc).

Trial counsel's failure to pursue this additional evidence cannot be characterized as the product of a reasonable strategic decision. Counsel uncovered nothing in their limited inquiry into Williams' background to suggest that "further investigation would have been fruitless." *Wiggins*, 539 U.S. at 525, 123 S. Ct. at 2537. To the contrary, the many red flags noted above would have a prompted a reasonable attorney to conduct additional investigation. Moreover, acquiring additional mitigating evidence would have been consistent with the penalty phase strategy that counsel ultimately adopted. Given that counsel's sentencing case focused on establishing that Williams had a troubled background, they had every incentive to develop the strongest mitigation case possible. *Cf id.* at 526, 123 S. Ct. at 2538. It thus is apparent that counsel's failure to expand their investigation "resulted from inattention, not reasoned

strategic judgment." *Id.* at 526, 123 S. Ct. at 2537.[8]

In finding trial counsel's performance adequate, the Alabama Court of Criminal Appeals focused entirely on counsel's decision not to present additional mitigating evidence at sentencing.[9] The court did not, however, address whether counsel's *investigation* into such evidence was adequate under prevailing professional norms. The court appears to have assumed, based on the fact that Williams' sentencing phase presentation included some evidence of abuse, that counsel's investigation was sufficient to permit a reasonable decision as to what evidence should be offered. *See Williams v. State*, 782 So. 2d at 826. However, "[i]n assessing the reasonableness of an attorney's investigation, . . . a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a

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[8] The state notes that trial counsel made a strategic decision not to utilize psychological testimony from Dr. Rosen at the penalty phase because they determined that such testimony would be unfavorable to Williams. The state argues that, in light of this strategic decision, trial counsel were not required to "shop" for another expert to provide opinions similar to those offered by Dr. Gelwan at postconviction. However, this argument is inapposite, as Williams is not relying on the medical conclusions provided by Dr. Gelwan. The only evidence from Dr. Gelwan's testimony that Williams has cited are the factual assertions drawn from his investigation into Williams's background. Had counsel consulted the sources relied upon by Dr. Gelwan in conducting this investigation, they would have discovered the information described in his testimony.

[9] As noted, the Alabama Court of Criminal Appeals adopted the relevant portion of the Circuit Court's opinion with respect to this claim.

reasonable attorney to investigate further." *Wiggins*, 539 U.S. at 527, 123 S. Ct. at 2538. As discussed above, we conclude that trial counsel abandoned their investigation at an unreasonable point, particularly in light of the information about Williams' background that the investigation revealed. By simply assuming that trial counsel's investigation was adequate, without considering the reasonableness of counsel's decision to limit the scope of their inquiry, the Alabama court unreasonably applied *Strickland*. *See id.* at 527-28, 123 S. Ct. at 2538.

In its order denying relief under § 2254, the district court did not rely on the Alabama courts' assessment of trial counsel's performance. Instead, it found the record insufficiently clear as to the specific actions taken by counsel in preparation for the penalty phase. The court thus concluded that Williams failed to carry his burden to establish deficient performance. *See Chandler*, 218 F.3d at 1315 n. 15 (holding that ambiguous or silent record is insufficient to overcome presumption that attorney's conduct was reasonable).

We believe the district court's conclusion mischaracterizes the evidence adduced during the Rule 32 hearing. In that proceeding, Lackey, Wilson, and three of Williams' family members each provided specific information concerning the scope of trial counsel's investigation into mitigating evidence. As noted, Lackey testified that he did not recall speaking to any of Williams' family members---with the possible exception of one relative---as part of his sentencing phase preparation. He further testified that he never spoke to Williams about the latter's background. Lackey also stated that his preparation for trial involved little more than legal research. For his part,

Wilson stated that Lackey was responsible for gathering information for the sentencing phase because only Lackey had previously handled a capital trial. Moreover, Queenie May Patterson Peoples, Curtis Williams, and Deborah Perine all testified that they were never contacted by Williams' attorneys prior to trial. In light of this unrebutted testimony, the district court erred in concluding that the record was unclear with respect to trial counsel's investigation. Williams' Rule 32 evidence was sufficient to overcome the presumption that trial counsel's investigation was reasonable.

In light of the foregoing, we conclude that trial counsel's investigation of mitigating evidence in Williams' background fell short of prevailing professional norms, and that the Alabama Court of Criminal Appeals unreasonably applied *Strickland* in ruling to the contrary. We now turn to *Strickland's* prejudice prong.

2. Prejudice

To establish prejudice under *Strickland*, a petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result in the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068. In a case challenging a death sentence, "the question is whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Id.* at 695, 104 S. Ct. at 2069. This standard presumes a reasonable sentencer. *Id.* at 695,

104 S. Ct. at 2068 ("[T]he idiosyncracies of the particular decisionmaker, such as unusual propensities toward harshness or leniency[,] . . . . are irrelevant to the prejudice inquiry."). In assessing prejudice, the reviewing court must consider the totality of the evidence, mindful that "a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *Id.* at 696. 104 S. Ct. at 2069.

The mitigation evidence that Williams' trial counsel failed to discover paints a vastly different picture of his background than that created by Arcola Williams' abbreviated testimony. As reported by Williams' family members and Dr. Gelwan, the violence experienced by Williams as a child far exceeded-in both frequency and severity -the punishments described at sentencing. These witnesses characterized the Williams household as one in which severe beatings and other forms of violence occurred on a near constant basis. Moreover, contrary to the impression created by Arcola Williams, this violence was not of a type remotely associated with ordinary parental discipline. Williams Sr.'s beatings were in fact serious assaults, many of which involved the use of deadly weapons. In a number of instances, these attacks resulted in serious injuries, most notably in the case of Williams' brother, Thomas. This evidence surely would have been relevant to an assessment of Williams' culpability, particularly in light of his age and lack of prior criminal history. *See Wiggins*, 539 U.S. at 535, 123 S. Ct. at 2542 (noting that petitioner "has the kind of troubled history we have declared relevant to assessing a defendant's moral culpability").

Other evidence introduced in the Rule 32 proceedings contradicted factors expressly relied upon

by the trial judge as grounds for imposing the death penalty. In discounting the significance of the abuse described at sentencing, the judge emphasized that the defendant was cared for by his mother and grandmother. Therefore, the judge believed, "[i]t . . . would strain credulity to find that the Defendant's background was one of total deprivation." But the Rule 32 evidence indicated that Williams' childhood was in fact characterized by an extreme level of deprivation, both physical and emotional. According to the testimony, Williams' parents provided him with inadequate food and clothing, neglected his basic hygiene and medical needs, permitted him to roam the neighborhood unsupervised, and ignored his deteriorating academic performance. Moreover, in contrast to the judge's observation, Arcola Williams was described as a neglectful parent who was frequently absent during her son's childhood. The testimony also indicated that Ms. Williams herself contributed to the physical abuse suffered by Williams. Given the importance the trial judge placed on Williams' relationship with his mother and his purported lack of deprivation, this evidence clearly would have been beneficial to Williams had it been presented.

Further supporting a finding of prejudice is the fact that this case is not highly aggravated. It is well established that "a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *Strickland*, 466 U.S. at 696, 104 S. Ct. at 2069; *see also Wiggins*, 539 U.S. at 538, 123 S. Ct. at 2544 (finding prejudice where state's evidence in support of death penalty was "far weaker" than in prior

case). Here, the trial court imposed the death penalty on the basis of a single statutory aggravating circumstance--one that is an element of the underlying capital murder charge. *See* Ala. Code § 13A-5-40(a)(2). The relative weakness of the state's death penalty case is underscored by the fact that the jury recommended a life sentence by a vote of 9-3. We have recognized that "[p]rejudice is more easily shown in jury override cases because of the deference shown to the jury recommendation." *Harich v. Wainwright*, 813 F.2d 1082. 1093 n.8 (11th Cir. 1987), *adopted by en banc court*, 844 F.2d 1464, 1468-69 (11th Cir. 1988) (en banc), *overruling on other grounds recognized in Davis v. Singletary*, 119 F.3d 1471, 1482 (11th Cir. 1997). The fact that the jury decisively voted against the death penalty, even without the powerful evidence adduced at postconviction, weighs heavily in favor of a finding of prejudice.

The Alabama Court of Criminal Appeals nevertheless discounted the postconviction evidence, finding no reasonable probability that it would have led the trial court to impose a sentence other than death. The court based this conclusion primarily on the fact that the additional mitigating evidence did not refute the evidence establishing Williams' responsibility for the capital murder. *See Williams v. State*, 782 So. 2d at 826 ("[T]he evidence regarding Williams' background was never found to have a causal relationship with Williams committing capital murder."). In light of that consideration, the court concluded that Williams' Rule 32 evidence had "little mitigation value." *Id.* at 827.

We conclude that the Alabama court's emphasis on the absence of a "causal relationship" between Williams' mitigating evidence and the statutory

aggravator reflects an unreasonable application of *Strickland*. In so holding, we are guided by the Supreme Court's reasoning in *Williams v. Taylor*.[10] In that case, the petitioner, a death row inmate, argued in state habeas proceedings that his trial counsel rendered ineffective assistance by failing to investigate and present mitigating evidence concerning his childhood, intellectual capacity, and conduct in prison. The Virginia Supreme Court concluded that the petitioner failed to establish sufficient prejudice, finding that the additional evidence "barely would have altered the profile of [the] defendant" presented at sentencing. *Williams v. Warden*, 487 S.E.2d 194, 200 (Va. 1997). The U.S. Supreme Court held that this "prejudice determination was unreasonable insofar as it failed to evaluate the totality of the available mitigation evidence--both that adduced at trial, and the evidence adduced in the habeas proceeding--in reweighing it against the evidence in aggravation." *Williams v. Taylor*, 529 U.S. at 397-98, 120 S. Ct. at 1515.

Central to the Court's holding in *Williams* was its conclusion that the Virginia Supreme Court failed to give sufficient weight to mitigating evidence that did not relate to the aggravating circumstance in the case--

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[10] For the reasons discussed above with respect to *Wiggins*, *see supra* note 7, *Williams* constitutes clearly established federal law within the meaning of § 2254(d)(1), even though it was issued after the relevant state court decision in this case. Indeed, we have previously cited *Williams* in reviewing state court decisions that were issued before it was handed down. *See Callahan v. Campbell*, 427 F.3d 897, 926, 934-35 (11th Cir. 2005); *Crawford v. Head*, 311 F.3d 1288, 1314-16 (11th Cir. 2002).

the petitioner's future dangerousness. While noting that the postconviction evidence might not have refuted the evidence supporting this aggravator, the Court emphasized that it still could have affected the sentence imposed. *See id.* at 398, 120 S. Ct. at 1515 ("[T]he graphic description of Williams' childhood, filled with abuse and privation, or the reality that he was 'borderline mentally retarded,' might well have influenced the jury's appraisal of his moral culpability."). The Court made clear that "[m]itigating evidence unrelated to dangerousness may alter the jury's selection of penalty, even if it does not undermine or rebut the prosecution's death-eligibility case." *Id.* at 398, 120 S. Ct. at 1516. Because the state court did not entertain that possibility, it "failed to accord appropriate weight to the body of mitigation evidence available to trial counsel." *Id.*

The Alabama Court of Criminal Appeals' opinion implicates the same concern that the Court addressed in *Williams*. Like the state court in that case, the Alabama court rested its prejudice determination on the fact that Williams' mitigating evidence did not undermine or rebut the evidence supporting the aggravating circumstance. It did not consider the possibility that the mitigating evidence, taken as a whole, might have altered the trial judge's appraisal of Williams' moral culpability, notwithstanding that the evidence did not relate to his eligibility for the death penalty. In particular, the court did not address Williams' argument that the evidence contradicted factors relied upon by the trial judge in assessing Williams' culpability. Thus, as in *Williams*, the court "failed to evaluate the totality of the available mitigation evidence" in reweighing the aggravating and

mitigating circumstances in this case. *Id.* at 397-98, 120 S. Ct. at 1515. This failure constitutes an unreasonable application of *Strickland.*

In its own assessment of prejudice, the district court focused on the fact that the same judge who sentenced Williams to death presided at the Rule 32 hearing. Because that judge found no reasonable likelihood that the additional evidence would have prompted him to impose a different sentence, the district court concluded that Williams could not establish prejudice. However, a trial judge's post-hoc statements concerning how additional evidence might have affected its ruling are not determinative for purposes of assessing prejudice. Indeed, in *Strickland,* the trial judge who sentenced the petitioner to death testified during federal habeas proceedings that the additional evidence would not have caused him to rule differently. *See id.* at 678-79, 104 S. Ct. at 2060; *Washington* v. *Strickland,* 693 F.2d 1243, 1249 (11th Cir. 1982). The Supreme Court held that this testimony was "irrelevant to the prejudice inquiry." *Strickland,* 466 U.S. at 700, 104 S. Ct. at 2071. The Court made clear that the assessment should be based on an objective standard that presumes a reasonable decisionmaker. *Id.* at 695, 104 S. Ct. at 2068. Applying that standard, we conclude that Williams has demonstrated sufficient prejudice to warrant relief. For the reasons discussed above, we cannot say with confidence that the outcome of the sentencing phase would have been the same absent his trial counsel's errors.

Having determined that Williams has established both components of an ineffective assistance of counsel claim, and that the Alabama Court of Criminal Appeals' decision involved an unreasonable application

of *Strickland,* we conclude that Williams is entitled to habeas relief as to his sentence. Accordingly, we reverse the district court's denial of relief as to Williams' ineffective assistance claim.

B. *Batson v. Kentucky* Claim

In his amended § 2254 petition, Williams argued that the prosecutor utilized peremptory challenges in a racially discriminatory manner, thereby violating the equal protection principles set forth in *Batson.* On appeal, Williams challenges the district court's determination that this claim is procedurally barred because it was not exhausted in state court. We review the district court's ruling on this issue *de novo. Atwater v. Crosby*, 451 F.3d 799, 809 (11th Cir. 2006).

A habeas petitioner generally may not raise a claim in federal court that was not first exhausted in state court. 28 U.S.C. § 2254(b)(1); *Kelley* v. *Sec'y for Dep't of Corr.,* 377 F.3d 1317, 1343 (11th Cir. 2004). "To properly exhaust a claim, the petitioner must afford the State a full and fair opportunity to address and resolve the claim on the merits." *Kelley,* 377 F.3d at 1344 (internal quotation marks omitted). "While we do not require a verbatim restatement of the claims brought in state court, we do require that a petitioner presented his claims to the state court such that a reasonable reader would understand each claim's particular legal basis and specific factual foundation." *McNair,* 416 F.3d at 1302 (internal quotation marks omitted).

In *Batson*, the Supreme Court established a three-part test to evaluate claims of racial discrimination based on the prosecution's use of peremptory challenges. First, the defendant must make a *prima facie* showing that the challenges at issue were made

on the basis of race. *Batson*, 476 U.S. at 96, 106 S. Ct. at 1723. Once the defendant makes this showing, the burden shifts to the state to rebut the inference of discrimination by offering race-neutral explanations for the challenges. *Id.* at 97, 106 S. Ct. at 1723. If the prosecutor articulates such reasons, the court must then determine whether the defendant has established purposeful discrimination. *Id.* at 98, 106 S. Ct. at 1724.

Williams' amended habeas petition alleges facts encompassing steps two and three of the *Batson* inquiry. *(See* Am. Pet. at 39 ("All of the reasons that the prosecutor offered in defense of its peremptory strikes against qualified black veniremembers are either contrary to or unsupported by the record, or are not facially neutral.")). The district court, however, determined that the *Batson* claim raised by Williams on direct appeal related only to the second step -- i.e., whether the prosecution's explanations for the peremptory strikes were race-neutral. The court thus concluded that Williams' step three *Batson* claim was unexhausted. Because claims not raised on direct appeal are barred under Alabama procedural default rules, the court concluded that exhaustion would be futile.

Williams argues that he presented the substance of his *Batson* step three claim to the Alabama Supreme Court on direct appeal. We agree. A review of Williams' brief to that court demonstrates that his *Batson* argument was broader than the district court's opinion suggests. Williams devoted several pages of the brief to arguing that the state's proffered reasons for the peremptory challenges were unpersuasive under the circumstances. For example, Williams argued that the prosecution failed to conduct meaningful *voir dire* on

the purported reasons for the peremptory strikes. In addition, he argued that the justification for striking an African-American potential juror applied equally to white venire members who were not excluded. These are *Batson* step three arguments in that they go to the question of whether the prosecutor's "race-neutral explanation should be believed." *Hernandez v. New York*, 500 *U.S.* 352, 365, 111 S. Ct. 1859, 1869, 114 L. Ed. 2d 395 (1991) (plurality opinion). Given these contentions, a reasonable reader would have understood that Williams' claim implicated the third *Batson* step. *See McNair*, 416 F.3d at 1302.

We thus conclude that Williams has satisfied the exhaustion requirement as to his *Batson* step three claim. Accordingly, we reverse the district court's ruling that the claim is procedurally barred from federal habeas review.

C. Denial of Evidentiary Hearing

Finally, Williams argues that the district court improperly denied his request for an evidentiary hearing. Williams contends that the "injudicious conduct" exhibited by the trial judge during the Rule 32 proceedings prevented him from developing evidence related to his ineffective assistance and *Brady*[11] claims.

"We review a district court's decision to grant or deny an evidentiary hearing for abuse of discretion." *Kelley*, 377 F.3d at 1333. A court abuses its discretion if it misapplies the law or makes clearly erroneous findings of fact. *Id.* Here, the district court determined

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[11] *See Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

that an evidentiary hearing was not precluded under § 2254(e)(2) because Williams was diligent in seeking to develop the factual bases of his claims in state court.[12] *See Williams v. Taylor*, 529 *U.S.* at 432, 120 S. Ct. at 1488. The Court then addressed whether a hearing was mandatory under *Townsend v. Sain*, 372 U.S. 293, 83 S. Ct. 745, 9 L. Ed. 2d 770 (1963), *overruled in part by Keeney v. Tamayo-Reyes*, 504 U.S. 1, 112 S. Ct. 1715, 118 L. Ed. 2d 318 (1992), *superseded by statute us stated in Williams*, 529 U.S. at 433, 120 S. Ct. at 1489. In *Townsend*, the Court held that a federal habeas court must hold an evidentiary hearing under the following circumstances:

> If (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4)

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[12] Section 2254(e)(2) provides:

> If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that --
>
> (A) the claim relies on --
>
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

> there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.

Id. at 313, 83 S. Ct. at 757.

The court determined that the grounds relied upon by Williams arguably implicated the third or the sixth of these factors. Applying these to Williams' claims, the court concluded that a hearing was not mandatory. While noting that the trial judge "interrupted testimony, questioned witnesses, interjected his own opinion, commented on evidence and arguably made some insensitive comments," the court found no indication that this conduct prevented Williams from developing evidence necessary to adjudicate his claims. The court also declined to exercise its discretionary authority to hold a hearing, finding the record to be fully developed with respect to the claims presented.

Upon careful review of the state court record, we find no error in the district court's ruling as to this issue. To be sure, the trial judge made a number of comments during the Rule 32 hearing that suggested a dismissive view of Williams' evidence. However, as the district court noted, Williams has not shown that he was in any way prevented from presenting testimony or introducing evidence in support of his claims. Thus, although many of the trial judge's comments certainly could be described as injudicious, we cannot say that Williams was denied a full and fair hearing within the

meaning of *Townsend*.[13] Moreover, because the record appears to have been fully developed as to Williams' claims, the district court's denial of an evidentiary

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[13] We nevertheless are troubled by many of the trial judge's comments. In a number of instances, the judge appeared to take on the role of an advocate against Williams' ineffective assistance claims. At one point, for example, the judge defended the process according to which he appoints counsel in capital murder cases. Noting that he always asks whether the attorney has a problem accepting the appointment, the judge said to Lackey: "And I'm sure I did that in this case, didn't I, Jim?" A similar comment occurred after Lackey testified that he could not recall counsel doing "anything in particular" to prepare for the sentencing phase beyond what had been done previously. The judge interjected: "Well, I do. I remember specifically you all calling his aunt." In a similar vein, the judge repeatedly vouched for trial counsel's qualifications. He expressed the view that Lackey was "extremely qualified," and described Wilson as a "very good" attorney. The judge also referred to Wilson as "my good friend."

Other statements suggest an unwillingness to give Williams' mitigating evidence serious consideration. For example, after Arcola Williams testified that her son Thomas had been diagnosed with schizophrenia, the judge remarked: "Psychologists and psychiatrists love that one, paranoid schizophrenia." As Ms. Williams continued, describing her son's abnormal brain scan results, the judge said: "They did one on me and couldn't find a brain." Later, the judge derisively referred to Dr. Gelwan as "[p]ost traumatic syndrome man" and described the doctor's conclusions as "[p]ost-traumatic stress disorders, whatever that may be." When advised that Dr. Gelwan's testimony was concluding, the judge stated: "For the record, good." On another occasion, the judge interrupted Peoples' testimony regarding her father's abuse to inquire about the name of a particular hairstyle. While such comments by themselves may not establish a violation of *Townsend*, they certainly raise concerns as to whether Williams' evidence was appropriately considered.

hearing was not an abuse of discretion.

III. CONCLUSION

For the foregoing reasons, we REVERSE the ruling of the district court as to the claim of ineffective assistance of counsel at the penalty phase; we REVERSE the ruling of the district court as to Williams' *Batson* claim; and we AFFIRM the ruling of the district court as to the denial of an evidentiary hearing. We REMAND to the district court for proceedings consistent with this opinion.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION
CIVIL ACTION NO. 01-0777-CB-C

HERBERT WILLIAMS, JR.

Petitioner,

VS.

MICHAEL HALEY,

Respondent.

OPINION AND ORDER

Petitioner Herbert Williams, Jr. has filed a petition pursuant to 28 U.S.C. § 2254 seeking habeas corpus relief from his state capital murder conviction and sentence. In Stage I of these proceedings, the Court decided issues of procedural default and determined which claims would proceed to consideration on the merits. Now, having considered the remaining claims on the merits, the Court concludes that the petitioner is not entitled to relief.

FACTS

The Murder

Timothy Hasser, a prominent young Mobile, Alabama businessman, was murdered on November 2, 1988. On the day of his murder, Hasser had been alerted by his home security company that a burglar alarm had been tripped at his home, but he believed it to be a false alarm. Hasser was last seen leaving his office at approximately 4:15 p.m. Hasser's home security system was deactivated at 4:41 p.m. Around 8:00 p.m. that evening, a police officer saw a white

Porsche stopped on a bridge near Jackson, Alabama, approximately 80 miles north of Mobile. The Porsche, which belonged to Timothy Hasser, was driven by the defendant, Herbert Williams. When the officer stopped to assist, Williams said he was having car trouble. The officer followed Williams to a gas station and noticed that something was amiss. Williams was having trouble using the Porsche's manual transmission, and there was thick dark liquid dripping from the rear hatch. When they reached the gas station, the officer saw Hasser's body in the rear hatch of the car. He had been shot, and weights were tied to each of his ankles.

Williams' Statements

First Statement

At the scene, Williams told police that he and his friend (the decedent) had been involved in a drug deal in Demopolis, Alabama. The people they were dealing with had taken his friend away, shot him and brought him back with weights tied around his feet. They told Williams that he could live because he was black but that he had to take his friend and leave. Williams directed police to the gun that killed Hasser, a .38 caliber, under the front seat of the Porsche. Six empty cartridges were found in Williams' pocket.

Second Statement

Later that night at the police station Williams gave another, more detailed statement. He said that he and the victim, whom he identified as "Timothy Ross", went to an area south of Demopolis on Highway 43 to buy crack cocaine. They were late because Timothy was waiting for his friend, a D.A., to come over to his house for a beer. They arrived at the meeting place a little

after 6:00 p.m. and met three people--a Jamaican, a Haitian and a black male named Nep. Nep reached into the victim's car, took out a brief case containing $3,000 that belonged to the victim, and told the victim and Williams that they were being ripped off. Initially, Williams said that the victim was shot while running away. Later, Williams said that both he and the victim were forced to get out of the car and lie on the ground. The victim was shot, but Williams was spared because he was black. Williams was instructed to get rid of the body, so he drove to his grandmother's house in Wagarville where he got some weights and tied them to the body. He was going to throw the body off the bridge and into the river when the police officer stopped him. After making this statement and answering some questions, Williams invoked his right to counsel, and the interview ceased.

Third Statement

On November 4, 1998, Agent Michael Barnett, an Alabama Bureau of Investigation (ABI) investigator assigned to the case, was at the Jackson Police Department. Williams was being held there at the city jail, and Williams' parents were there to see him. Barnett went into the coffee room and introduced himself to Mr. and Mrs. Williams. They asked Barnett why their son was in jail. Mr. Williams told Barnett his son's side of the story, *i.e.*, the drug deal gone bad, and Barnett said that might be true but there was also evidence pointing in another direction. Mr. Williams wanted to know if Barnett was going to talk to his son, and Barnett replied that he could not because Williams had requested an attorney. Barnett told Mr. Williams that he could only talk to his son if Williams requested to have a police officer come and talk with him. Mr. and

Mrs. Williams went back and talked to their son, then came out and told Barnett that Williams wanted to speak with him.

Barnett met with Williams and again advised him of his rights, using a waiver of rights form. Barnett advised Williams that he knew Williams had terminated the previous interview and requested counsel. He explained that he could not speak to Williams without counsel unless Williams so requested. Williams said he understood and, at Barnett's direction, wrote on the bottom of the form "I requested to talk to the police officer today, November the 4th', 1988. They advised me of my rights and I understand them." Williams then spoke with Barnett for seven hours, resulting in a 21-page written statement.

In this statement, Williams claimed to have known Hasser for two years. According to Williams, the two struck up a conversation as he was admiring Hasser's car, and Hasser asked him where he could obtain drugs. Williams began delivering packages for Hasser. Hasser paid him $500 or less for these deliveries but was putting some money in savings for him and also promised that after several deals he would give Williams his car, a Porsche 928, and $7,500. In October 1988, Hasser told him Williams to get a gun and come to Mobile on Halloween. Williams took a gun from his great-grandmother's house in Wagarville. Williams went to Mobile, but he was not supposed to go to Hasser's house because a black man visiting someone in Hasser's neighborhood would arouse suspicions. Eventually, on November 1, Hasser saw Williams walk by his house, and the two gestured toward the park. They met at the park, and Hasser told Williams that the deal was set for the next day in Mt. Vernon. Hasser

told Williams to come to his house the next day and that he would leave a rear window open. If the car was not there, Williams was to ring the door bell because Hasser's girlfriend might be there. Hasser gave Williams the alarm code in case the alarm went off. The next day Williams went to the house and crawled in through a back window. He did not think the alarm went off, so he did not use the code. About 15 minutes later, the police showed up and looked in through the windows. Williams climbed up in the attic and chewed through a wire that he thought went to the alarm system. When Hasser got home, he was in a hurry to leave because his friends John and Claudia were coming over for a beer. Hasser left the television on and the front door open. The two drove in Hasser's car to Creola, north of Mobile, to a warehouse where the deal was to take place. While they were waiting, Hasser wrote out a bill of sale for the car: "I, Tim Rasses [sic] sell my 1980 928 Porche [sic] . . .to Herbert Williams for One Dollar." (V. IV at 497.) Hasser signed this bill of sale and handed it to Williams to sign. At that time, someone tapped on the window and forced the two out of the car at gun point. Two men took Hasser behind the building. A third man stayed with Williams and forced him to get back in the car. Williams heard gunshots. The two men came back and took a package out of Hasser's car, punched Williams in the stomach and dropped a gun in the back of the car. They talked about killing Williams but said it would not make any difference. Williams shot at them as they left. He then found Hasser and realized he had been shot but was still alive. Williams got Hasser into the car and drove toward the hospital in Chatom. Before he reached the hospital, Hasser died. Williams panicked and decided he would throw the body off the bridge in Jackson. He

first went to his great-grandmother's house in Wagarville and got some weights to tie to the body and some socks to use as ties. Then, he drove to Jackson to dispose of the body. The policeman drove up while he was waiting to throw the body off the bridge, and he was caught.

Fourth Statement

Williams wrote yet another account of the murder while he was in jail. Although this was not intended as a statement for the police, a fellow inmate, Golliday Miller, obtained it and gave it to investigators. A handwriting expert confirmed that the document was written by Williams. The statement was very similar to Williams' third statement except that the purpose of the meeting in Creola was a "trial" of someone who cheated "Nestor", a drug dealer with whom Hasser did business. Hasser told Williams that he (Williams) was to kill the person on trial. Hasser signed the Porsche over to Williams before the "trial" began. Then, it turned out that Hasser was the person on trial for cheating Nestor. One of Nestor's men pointed an Uzi at Williams and forced him to shoot Hasser.

Other Incriminating Evidence

Police searched Williams' room in the home where he lived with his great-grandmother. There they found weights similar to those tied around the victim's ankles and a book entitled *New I.D. in America*. They also found a diary, which contained the following entries:

> Sunday, October 30, 1988. I will search this house for that gun. If I find it Monday, then I'm going to catch Larry to Prichard [sic]. I'll then walk to my destination. If the car is not there,

> well, I will break in from the back and wait. After doing the job, leave the place in my new car. Come back after I have gotten the gears right, load up and dump the body.
>
> Monday, the 31st, 1982 [sic], Porsche 928, dump body, Tuesday, one, get as much money as I can, get car,' R-E-G, abbreviated 'from Chatom, go Dixon Mills, hit Pine Hill.

In the Porsche, investigators found two crudely drafted documents purporting to convey ownership of the Porsche from Hasser to Williams. One was written on the back of an envelope and the other on a bank deposit receipt. Also, petitioner's fingerprints were found in Hasser's house.

Pretrial

Williams was indicted by a Mobile County Grand Jury and charged with capital murder. Initially, attorneys Arthur Madden, a criminal defense attorney with experience in capital cases, and Jay Kimbrough, a former assistant district attorney, were appointed to represent Williams. In April 1989, Mr. Madden was permitted to withdraw due to a conflict of interest. Attorney James Lackey, a long-time criminal defense attorney also with experience in capital cases, was appointed to replace Mr. Madden. In September 1989, Mr. Lackey and Mr. Kimbrough moved to withdraw due to defendant's refusal to cooperate with them.[1]

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[1] In the motion, counsel alleged that the defendant had "totally failed or refused to cooperate" or to discuss the case, the facts or any possible defenses, that he had been distrustful and hostile, that he had demanded that his attorneys withdraw from the case and that he demanded to be returned to his cell during a

Judge Ferrill McRae, the circuit judge assigned to the case, held a hearing and denied the motion to withdraw. However, Judge McRae appointed a third attorney, James Wilson, also an experienced criminal defense attorney, to assist in representing the defendant. Subsequently, Mr. Kimbrough was permitted to withdraw due to his concurrent representation of a potential witness. Defense counsel filed numerous pretrial motions, including a motion for change of venue, a motion for youthful offender treatment, discovery motions, motions to suppress evidence and statements, a motion to authorize expert services,[2] and a motion to dismiss the indictment.

At a motions hearing on February 3, 1989, Judge McRae addressed the youthful offender motion. Judge McRae read into the record some findings from the report prepared by the Alabama Department of Probation and Parole and held that "after reviewing all the information . . . .I see no way in the world that I can treat the Defendant as a Youthful Offender." (R. Vol. II, 13.) Williams' attorney requested clarification on the denial of youthful offender treatment. Judge McRae stated that he "didn't deny it basically simply on what [the probation officer said about Williams' drug use'][ ] [b]ut on the totality of the information contained within that report, as well as my knowledge of the Alabama Law." (R. Vol. II, 16.) After explaining that he did not go into the details of the report because the press was present in the courtroom, Judge McRae asked defense counsel if there was "[a]nything else[.]"

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meeting with counsel. (R. Vol. I, 56.)

[2] One of the expert services authorized was a psychiatric examination. Defense counsel hired Dr. Clyde Van Rosen, a psychiatrist, to conduct evaluate Williams prior to trial.

Mr. Kimbrough responded, "No sir." *(Id.)*

The prosecutor was ordered to provide open file discovery in this case. Judge McRae addressed the defendant's discovery motion at a hearing on March 31, 1998. After some initial discussion with defense counsel, the judge stated, "[The prosecutor]'s giving you an open file. I don't know how you could ask for anything else." (R. Vol. II, 23.) Mr. Kimbrough responded with concerns that the prosecutor might not have information that would be contained in the investigator's file. Judge McRae then ordered, "All right. We'll make, we'll make this language. That the District Attorney in open court said that his file is open to you to look at. But if he comes into possession of any information at a later time that is not in his file at this time, he's to let you know of that." (R. Vol. II, 23-24.) Judge McRae reiterated the open file discovery order at a motions hearing on October 13, 1989. Addressing a new discovery motion filed by defense counsel, the judge stated that the motion did not make a lot of sense to him "'because it's in the record already from the District Attorney that the file is--his file is open for [the defense] to read at any and all times.'" (R. Vol. II, 75.) The District Attorney's willingness to comply with that order is noted at least twice in the record. At the October 13th hearing, Mr. Kimbrough testified that the District Attorney's file was available to him and that he had availed himself of it during his representation of the defendant. (R. Vol. II, 97.) In chambers on the day of jury selection, the District Attorney, Mr. Galanos stated for the record that he had told defense counsel that he would be in his office "all day Sunday [before jury selection] and you're entitled to anything in my files." (R. Vol. III, 75.) Mr. Lackey confirmed that this

conversation had taken place.

Jury Selection and Suppression Hearing

Jury selection commenced on February 12, 1990. During voir dire Judge McRae asked potential jurors whether they would be unable to impose the death penalty under any circumstances. Four prospective jurors answered in the affirmative. Defense counsel attempted to rehabilitate them, but each remained adamant in their conviction that they could not vote to impose the death penalty and the judge granted the prosecutor's challenges for cause. (R. Vol. II, 149-52, 158-59 & 165-66.) Several members of the venire indicated that they had heard or read pretrial publicity about the case. Some of them recalled news reports that the victim's car had been stolen. Defense counsel interviewed each of these potential jurors on voir dire. (R. Vol. III, 211-12, 218,246 & 253.) Counsel interposed a challenge for cause to one of those jurors, but it was denied. (R. Vol. III, 211-12.) Each of the jurors who heard news reports about a stolen car indicated that he or she could set those reports aside and base a verdict solely on the evidence presented at trial. Once each side had exercised its peremptory strikes, the defense made a *Batson* challenge because the prosecution struck either four out of seven or three out of six African American jurors.[3] The prosecutor proffered race-neutral reasons for each of his strikes. Judge McRae found that "the [prosecutor's] explanations [we]re valid" and denied the *Batson* motion. (R. Vol. III,

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[3] At the time the *Batson* challenge was made, there was some confusion among the court and counsel about the number of African American jurors who had been on the panel. (R. Vol. III, 267-68.)

276.)

Immediately prior to trial, Judge McRae held a hearing on Williams' suppression motions. At issue was the admissibility of all four statements, as well as the admissibility of the evidence recovered from the car and the evidence recovered from the home. Without need for elaboration, Judge McRae ruled that the first two statements and the evidence were all admissible. The third and fourth statements were also found to be admissible, and the judge stated the reasons for his ruling. He concluded that the third statement was instigated by the defendant, not the ABI agent, and therefore did not run afoul of the Supreme Court's opinion in *Edwards v. Arizona*, 451 U.S. 477 (1981).[4] The fourth statement was deemed admissible, despite the lack of testimony from the inmate who obtained it,[5]

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[4] In *Edwards*, the Supreme Court addressed the admissibility of a statement made in response to police interrogation after defendant had invoked his right to counsel:

> We hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.

Id. At 484-485.

[5] The inmate, Golliday Miller, suffered a complete lapse of memory when he took the stand at the suppression hearing.

because there was expert testimony that it was written in the defendant's own handwriting.

Trial and Sentencing

At trial the state's theory was that Williams had targeted Hasser, whom he did not know, for his Porsche. The prosecution introduced testimony about the events leading to the defendant's arrest. In addition, some of defendant's friends and acquaintances testified that prior to the murder Williams, who was nineteen and unemployed, had told them he was getting a Porsche. The prosecution also introduced the oddly drafted bill of sale found in the Porsche and the diary found in defendant's room in which he detailed his plan to get the Porsche 928, do the job, and dump the body. Defendant's own statements--inconsistent, implausible explanations of the murder--were proffered as further evidence of guilt. In addition, several witnesses were presented to refute Williams' claims that he and the victim knew each other, that they were involved in drug deals together and that the victim willingly left his house with Williams on the day of the murder.

Defendant's statements provided the theme for the defense. The defense argued that it was a simple murder--no robbery involved--and, therefore, not a capital case. The defense presented evidence to show that the defendant and the victim knew each other. For example, some of the defendant's friends testified that he had talked about his friend "Tim" or "Timmy" or about his friend who had a Porsche. Also, Williams had knowledge of personal details about the victim such as his alarm code and of the fact that he had a friend named John who was an Assistant District Attorney.

To bolster its theory that Hasser had prearranged a drug deal, the defense presented a witness who testified he saw Hasser traveling in a different area of town at the time the prosecution alleged he was being forced to drive to Creola. Finally, the defense pointed to the bills of sale found in the car. These documents, the defense claimed, took away the prosecution's motive theory. Since the Porsche had been conveyed to Williams, it could not have been his reason for killing Hasser. In sum, the theory of defense was that Hasser was murdered in a drug deal gone bad.

Closing arguments and jury instructions took place on the morning of February 16, 1990. After a lunch recess, the jury returned a verdict finding Williams guilty of capital murder.

The sentencing phase began immediately thereafter. The defense presented one witness--Arcola Williams, the defendant's mother. Mrs. Williams testified that her son had lived primarily with his paternal grandmother in Mobile, while she lived in Mt. Vernon, until he was four because she worked and could not take care of him. Once the defendant came to live with her and his father, Herbert Williams, Sr., his father beat him regularly. Mrs. Williams offered the following testimony about the father's abuse:

Q during the time that Herbert was home from the age of six up until the time he left to go to job corp, did his father beat him?

A Oh, yeah he beat him many times.

Q He beat him on a regular basis?

A Yes. Sometime seem like he whip em -- I know children have to be whipped sometimes. Seem

like he whipped him more than he should. More harsh to him.

Q Would he beat him with his first [sic], as you beat a man - - a grown man?

A After he got up some size, he did beat him from time to time with his fists.

Q What age was that?

A He had got to be a teenager then.

Q Did he have occasion to take him to another room and beat him?

A Yes . . .

(R. Vol. VII, 120.)

Mrs. Williams went on to describe an incident where the defendant's father took him into a bedroom and beat him. After the beating, the defendant went to a neighbor's house and called the police because his father had "choked him and did [sic] everything to him while he was in there." (R. Vol. VII, 121.) Mrs. Williams also testified that her husband "was drinking and get[ting] drunk pretty regular [sic]" when the defendant was growing up. The abuse was not limited to his children. According to Mrs. Williams, Herbert Williams, Sr. also beat her. The unflattering portrait of the defendant's father was completed by Mrs. Williams' testimony that Herbert Williams, Sr. was presently in jail for molesting and raping the couple's 14-year old mentally retarded daughter.

The defense argued against the death penalty based on two mitigating factors--the defendant's lack of any significant criminal history and the defendant's history

of childhood abuse and neglect. The sole aggravating factor for the jury's consideration was that the murder was committed during the course of a robbery. On the afternoon of February 16, 1990, the jury returned its sentence--life in prison without parole.

Alabama sentencing law in effect at that time permitted a sentencing judge to override a jury's sentencing decision in a capital case, At sentencing on April 11, 1990, Judge McRae overrode the jury's sentence and imposed the death penalty, giving the following reasons for his decision:

> [T]he capital offense was committed while the Defendant was engaged in the commission of a robbery. Therefore, the Title 13A-5-49(4) aggravating factor [murder during the commission of a felony] does exist and is considered.
>
> The evidence, as stated previously, proved beyond a reasonable doubt, that the Defendant was consumed with the notion of owning a Porsche and that that obsession was the sole motivation for the robbery/murder of Timothy Hasser.
>
> The Court further attaches great significance to the calculated precision with which this crime was planned and systematically executed. The Defendant's diary manifests a greed and depravity of mind characteristic of an individual who has an utter disregard for human life and the rights and property of others.

(R. Vol. V, 190.)

Judge McRae found three mitigating factors--two

statutory and one non-statutory. The two statutory factors were lack of criminal history and youth. While the judge made no specific comment about his consideration of the lack of criminal history, he found that "[t]he reptilian coldness with which this criminal act was devised and perpetrated vitiates any contention that the innocence of youth was a factor in the murder of Timothy Hasser." (R. Vol. V, 192.) The sole non-statutory mitigating factor was "that the Defendant's father was violent and abusive towards him as a child." *(Id.)* The judge found, however, that his fact "makes the Defendant no less accountable for his action. . . ." and also "considered that the Defendant's mother and grandmother testified in his behalf. Both appeared to be decent people who genuinely cared for the Defendant. It, therefore, would strain credulity to find that the Defendant's background was one of total deprivation." *(Id.)*

Direct Appeal

Attorney Al Pennington was initially appointed to represent the petitioner on appeal,[6] Pennington filed a rather perfunctory brief, raising only four issues in his brief to the Alabama Court of Criminal Appeals. The appellate court affirmed the conviction by written opinion issued September 20, 1991. No application for rehearing was filed by Mr. Pennington. On October 29, 1991, the Court of Criminal Appeals granted rehearing *ex mero motu* and remanded the case to the trial court for removal of counsel and appointment of new counsel. The trial court appointed attorney Gregory Hughes to replace Mr. Pennington. Mr. Hughes filed a brief in

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[6] Mr. Lackey and Mr. Wilson were permitted to withdraw after sentencing.

support of rehearing, raising several new issues. The Court of Criminal Appeals allowed additional briefing on these issues. On March 27, 1992, the court extended its opinion and overruled the application for rehearing. *Williams* v. *Alabama,* 627 So. 2d 994 (Ala. Crim. App. 1992). In the extended opinion, the court expressly addressed and rejected each of the claims raised in the petition for rehearing.

Mr. Hughes filed a petition for writ of certiorari on petitioner's behalf in the Alabama Supreme Court. The petition raised eleven issues and numerous sub-issues. The supreme court granted certiorari, and subsequently entered a written opinion affirming petitioner's conviction. In its opinion, the court specifically addressed some issues and as to the remaining issues "conclude[d] that the Court of Criminal Appeals correctly answered them." *Ex Parte Williams,* 627 So. 2d 999, 1005 (Ala. 1993). The court further stated: "[W]e have searched the record for plain error . . ., and we have found none." *Id.* Finally, as required by Ala. Code § 13A-5-53(b)(1), the court considered and weighed the aggravating and mitigating factors and found that the death sentence was "proper and not disproportionate to the crime." *Id.* An application for rehearing was overruled. Judgment was entered on September 14, 1993. Williams next filed a petition for writ of certiorari in the United States Supreme Court. That petition was denied. *Williams v. Alabama,* 511 U.S. 1012 (1994) (mem.).

Rule 32 Proceedings

On October 17, 1994, petitioner filed a collateral attack on his conviction and sentence in the Circuit Court of Mobile County pursuant to Rule 32 of the

Alabama Rules of Criminal Procedure. He was represented in those proceedings by attorneys Gilda Williams, Ellen Wiesner and LaJuana Davis. An amended petition was filed on July 24, 1995, and a second amended petition was filed on January 16, 1997. Judge McRae held an evidentiary hearing on June 19 and 20, 1997; the hearing was recessed and reconvened on July 22, 1997 for additional testimony.

Although Williams raised numerous claims in his Rule 32 petition, the evidentiary hearing focused on three issues. First, during Rule 32 discovery Williams' counsel had found documents in the prosecutor's file that had not been in the possession of trial counsel. Those documents consisted of three notes. The first two related to a sighting of a sports car similar to the victim's car in mid-afternoon on the day of the murder. Williams' Rule 32 counsel contended that this information was material to the defense because it strengthened the defense's drug deal theory. With this evidence, they could have argued that Hasser had been to Creola earlier on the day of the murder to scope out the site for the drug deal or meeting. One of these notes was found in the prosecutor's file and one was found in the investigator's file. Both indicated that a witness, Ken Nixon, had called the police and told them he had seen the car at the Creola Truck Repair around 3:30 p.m. on the day of the murder. Ken Nixon testified at the Rule 32 hearing, but his testimony was less helpful than the notes would suggest. He testified that he saw a light-colored sports car parked in front of an unoccupied building in Axis, Alabama.[7] He may have told police that it was a Porsche, but at the time he

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[7] Axis is on Highway 43 near Creola.

thought it was a Mazda. The state countered the alleged sighting of the victim's car in Creola with the testimony of the victim's sister-in-law, Carolyn Hasser, who testified that Timothy Hasser came by her house in Mobile around 3:00 p.m. to pick up her children. He took them to a department store, returned them home about 3:40 p.m. and left about ten minutes later. The third note contained information related to petitioner's claim that he and the victim were friends. The District Attorney had written that "Palmer Williams . . . advises that Jerry Parker may have seen" the defendant and the victim at the corner of Government Street and another street. No evidence was presented to establish who Palmer Williams or Jerry Parker were, when this sighting occurred or any other facts or circumstances related to this note.

The second focus of the Rule 32 hearing was the statement Williams gave to Agent Barnett on November 4, 1998 at Jackson police station--specifically whether police initiated contact after Williams invoked his right to counsel. Williams' mother, Arcola Williams, testified that when she and her husband went to the police station to see their son, they were taken aside by two officers, one of whom may have been an ABI agent. According to Mrs. Williams, the officers told them that their son was going to be in a lot of trouble, that a lawyer could cost $25,000 or more but that they could help their son if Mr. and Mrs. Williams could get him to talk to them. Mrs. Williams encouraged her son to talk to the police, but he never said whether or not he would talk to them. She and her husband came out and told police what her son had said about what happened. After that, Mrs. Williams testified, the police went in and talked to her son, then came out and spoke again

with her and Mr. Williams. At that point, according to Mrs. Williams, she and her husband left the police station.

The third area of testimony and evidence related to trial counsel's alleged failure to investigate and present mitigation evidence at the sentencing phase. Three family members testified about the abuse Williams and his siblings suffered at the hands of their father. Williams' half-sister, Queenie Mae Peoples, provided a detailed picture of horrific abuse perpetrated by Herbert Williams, Sr. against all members of their family over a long period of time during petitioner's childhood. Not only did Arcola Williams fail to protect her children from her husband's abuse, she also abused them herself. Mrs. Peoples also testified regarding the family history of incest.[8] Williams' paternal aunt, Deborah Perine, testified about Williams' early childhood--that he lived with his grandmother in Mobile while his mother lived and worked in Mt. Vernon and basically looked to his aunt as a mother figure during his early years. Williams' paternal uncle, Curtis Williams, testified primarily about Arcola Williams' role in the family and the lack of any family structure in the Williams household. Unable to protect her children or herself from her husband's abuse, Arcola Williams seemed to distance herself from them, according to Curtis Williams. Mrs. Williams was not home much--most of her time outside work was spent at church services or doing volunteer work for the church.

Rule 32 counsel called an expert witness, Dr. Eliot

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[8] Mrs. Peoples was the product of her maternal grandfather's rape of his own daughter, Arcola Williams.

Gelwan, a psychiatrist specializing in psychopathology and differential diagnosis, to testify regarding mitigation. Dr. Gelwan conducted an extensive investigation of Williams' background. He reviewed Williams' medical, school and employment records, along with the psychological testing and evaluation prepared by state and defense experts prior to trial. He conducted 40 to 60 hours of interviews with a number of people who knew Williams throughout his life. Dr. Gelwan also interviewed Williams and administered some psychological tests to him. As a result of his evaluation, Dr. Gelwan concluded that Williams suffered from Post-Traumatic Stress Disorder (PTSD). Dr. Gelwan arrived at that opinion based on four criteria: (1) Williams' early traumatic experiences--the brutality and terror of abuse suffered by Williams from early childhood; (2) Williams' reports of "intrusive memories"--recurrent images of the trauma of childhood abuse and (3) symptoms of "numbing and avoidance"-- avoiding places or situations that would trigger memories of abuse, amnesia about difficult events, withdrawal, detachment, and a restricted affect and an inability to love; and (4) persistent symptoms of increased arousal-sleep difficulties, angry outbursts, decreased concentration and hyper-vigilance. Dr. Gelwan testified that, in his opinion, someone with severe PTSD, such as Williams, could have a substantially diminished capacity to conform his conduct to the requirements of the law. On cross examination, Dr. Gelwan testified that it was his assessment that Williams had been truthful with him and that he "by and large" believed what Williams had told him. When asked whether there were any good aspects of the Williams family, Dr. Gelwan stated that Arcola Williams may have been well-intentioned and

that Williams had a supportive and caring extended family.

In rebuttal to this evidence, the state offered two types of testimony. First, one of defendant's defense attorneys, James Lackey, testified that the defendant had been evaluated by a psychiatrist, Dr. Van Rosen, prior to trial but that he did not use Dr. Van Rosen at sentencing because his testimony would not have been helpful. Second, the state called its own expert witness, Dr. Karl Kirkland, a psychologist, who disputed Dr. Gelwan's PTSD diagnosis.

On January 27, 1999, Judge McRae entered a written order denying the Rule 32 petition. With respect to the *Brady* claim, the judge held that the notes did not meet any of the three essential *Brady* elements. First, the notes were not suppressed because the court had ordered open file discovery and the defense counsel had not filed a motion alleging a lack of access to the file. Second, the notes were not exculpatory. The Palmer Williams note contained double or triple hearsay. The Nixon notes and testimony did not establish that the sports car Nixon saw belonged to the victim, and any inference to that effect that might be drawn McRae found to be refuted by Carolyn Hasser's testimony that Timothy Hasser was in Mobile at the time Nixon saw the sports car in Creola. Finally, none of the evidence was found to be material; that is, there was no reasonable probability that the result of the proceedings would not have been different if the evidence had been disclosed.

The evidence regarding petitioner's third statement had been offered to support the claim that trial counsel was ineffective for failing to present Mrs. Williams

testimony at the suppression hearing. Judge McRae rejected this claim because counsel's performance was neither unreasonable nor prejudicial. He found Mrs. Williams' underlying testimony to be implausible because (1) it conflicted with Agent Barnett's testimony about how the encounter at the police station took place and (2) police already had two statements from Williams.

Judge McRae also rejected petitioner's claim that trial counsel had been constitutionally ineffective for failing to discover and present the mitigation evidence presented at the Rule 32 hearing. The judge noted that there is always more evidence that, in hindsight, could have been presented. He further found that the mitigation evidence had little value because the crime was deliberately planned. As to defense counsel's failure to present expert testimony at the penalty phase, Judge McRae pointed out that Williams had been evaluated by a defense psychiatrist prior to trial but that evaluation did not yield any evidence that would have been helpful at the mitigation stage. In addition, Judge McRae did not find Dr. Gelwan's diagnosis to be credible in light of the findings of other mental health professionals who had examined Williams. Finally, Judge McRae rejected the mitigation/ineffective assistance argument because Williams failed to prove that Dr. Gelwan would have been available to testify at his trial in 1990.

Judge McRae's order was affirmed by the Alabama Court of Criminal Appeals by published opinion, which adopted large portions of Judge McRae's order. *Williams* v. *Alabama*, 782 So. 2d 811 (Ala. Crim. App. 2000). Petitioner filed a petition for writ of certiorari in the Alabama Supreme Court, which was denied on

November 9,2000.

SECTION 2254 PROCEDURAL HISTORY

Williams filed the instant 2254 petition on November 8, 2001 and amended it on July 31, 2002. In the amended petition, petitioner raised the following claims:

A. The State withheld exculpatory evidence in violation of *Brady* v. *Maryland*.
B. The prosecutor utilized peremptory challenges in racially discriminatory manner in violation of *Batson v. Kentucky*.
C. Trial Counsel Rendered Constitutionally Ineffective Assistance of Counsel
    a. By failing to present evidence at the motion to suppress;
    b. By failing to effectively voir dire jurors opposed to the death penalty;
    c. By failing to challenge for cause jurors, on the basis of bias, jurors who believed that petitioner had stolen the victim's car;
    d. By failing to object to the prosecutor's improper comments in closing arguments during the guilty phase;
    e. By failing to object to improper jury instructions during the guilty phase;
    f. By failing to present evidence at the sentencing phase to counter the judge's finding that the petitioner's life was not one of total deprivation;
    g. By failing to investigate petitioner's background, which would have yielded mitigation evidence to present at the

sentencing phase;

h. By failing to retain a mitigation expert to testify at the sentencing phase.

D. The State withheld evidence regarding the circumstances of the statement petitioner gave to ABI Agent Barnett.

E. Alabama sentencing scheme allowing judicial override is unconstitutional in light of *Ring v. Arizona*.

F. The trial court's denial of youthful offender status violated petitioner's constitutional rights under the Eighth and Fourteenth Amendments.

G. The trial court's limits on and interference with voir dire violated petitioner's constitutional rights.

H. The trial court refused to allow probing voir dire of jurors who expressed some opposition to the death penalty in violation of *Witherspoon v. Illinois*.

I. The trial court failed to excuse for cause biased jurors.

J. The trial court violated petitioner's constitutional rights by requiring him to give hair samples.

K. The manner of execution used by the state of Alabama amounts to cruel and unusual punishment.

The proceedings in this matter were divided into two stages. At Stage I, the parties submitted briefs on issues of procedural default and the need for an evidentiary hearing. In its Stage I order, this Court held that no evidentiary hearing was required or necessary and that the majority of claims were either

procedurally defaulted or moot. At Stage II, Claims A, B, C, D, and F[9] have proceeded to review on the merits, and the parties have fully briefed their positions as to the merits of each of those claims. For the reasons discussed below, the Court finds that petitioner is not entitled to relief on any of the remaining claims.

LEGAL ANALYSIS

Standard of Review

The standard a federal court must apply when reviewing a state habeas petition is quite deferential. A state court's decision may be overruled on legal grounds only if the decision was "contrary to. . . clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d)(1), or "involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States," *id.* A state court decision is "contrary to" clearly established law if "the state applies a rule that contradicts the governing law set forth in [the Supreme Court's] cases" or "if the state court confronts a set of facts that are materially indistinguishable from a decision of th[e] [Supreme] Court and nevertheless arrives at a result different from [its] precedent." *Williams v. Taylor*, 629 U.S. 362, 405-06 (2000). "Under the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413. Clearly established federal law is

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[9] As discussed in the Stage I order, certain portions of Claims B and C were found to be procedurally defaulted.

found "in the holdings, as opposed to the dicta, of th[e] [Supreme] Court's decisions as of the time of the relevant state-court decision." *Id.* at 412. Lower court decisions--even those of the federal courts of appeal--do not clearly establish law for purposes of 28 U.S.C. § 2254(d)(l). *Id.* at 381

A habeas petition may be granted on factual grounds only if the state court's adjudication of the claim "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," 28 U.S.C. § 2254(d)(2). The state court's factual determinations are to be presumed correct, and the petitioner has "the burden of rebutting the presumption of correctness by clear and convincing evidence." While these standards appear to "express the same fundamental principle of deference to state court findings," some courts of appeal have concluded that the two sections were intended to apply to different inquiries. The "overarching standard" is that set forth in § 2254--if the state court's factual determination was reasonable in light of the evidence before it, then it must be upheld. *Lambert v. Blackwell*, 387 F. 3d 210 (3rd Cir. 2004). Section 2254(e)(1) comes into play only when the state court's factual determinations are attacked by extrinsic evidence, *i.e.*, at a hearing in federal court. In that case, a federal court may overturn the state court's individual factual determinations if persuaded by clear and convincing evidence, but "[i]n the final analysis, [ ] even if a state court's individual factual determinations are overturned, what factual findings remain to support the state court decision must still be weighed under the overarching standard of section 2254(d)(2)." *Lambert v.*

Blackwell, 387 F.3d 210, 235-236 (3rd Cir. 2004); *accord Taylor v. Maddox*, 236 F.2d 992, 999-1000 (9th Cir. 2004); *Valdez v. Cockrell*, 274 F.3d 941, 951 n. 17 (5th Cir. 2001).

Claim A: *Brady* Violation/Prosecutor's Notes

Petitioner asserts that the prosecutor failed to disclose exculpatory evidence to the defense in violation of his constitutional right to due process as set forth in *Brady v. Maryland*, 373 U.S. 83 (1963). This claim focuses on three notes found in the prosecutor's file during Rule 32 discovery ("the prosecutor's notes"). These notes were proffered at the Rule 32 hearing to support petitioner's defense that the victim and the petitioner were friends and that the victim was killed by a drug dealer when a deal they were involved in together went bad.[10] The state court concluded that the notes did not satisfy the elements of a constitutional due process violation under *Brady*. That decision was

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[10] Two of the three handwritten notes found in the prosecutor's file related information regarding a car John Nixon had purportedly seen at an abandoned business in Creola on the day of the murder ("the Nixon notes"). Petitioner argued that the information contained in these notes supported his defense by providing proof that the victim had been at the site of the murder and alleged drug deal earlier on the day of the murder. The third note related to a different event, an alleged sighting of the defendant and the victim together in Mobile at an unspecified time by someone named Jerry Parker ("the Parker note"). According to the note, the information that Parker had seen the two together came from a third person-Palmer Williams. Petitioner argued that this information provided support for his claim that he and the victim knew each other prior to the murder, thus lending credibility to the petitioner's defense that he and the victim were involved in a drug deal together.

neither contrary to nor an unreasonable application of clearly established law. Furthermore, the factual determinations upon which the state court's decision was based were not unreasonable in light of the evidence presented at the Rule 32 hearing.

The Components of a *Brady* Claim

In *Brady* the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* at 87. A *Brady* claim has three components: (1) "the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching;" (2) "that evidence must have been suppressed by the State, either willfully or inadvertently;" and (3) "prejudice must have ensued ...." *Strickler v. Greene*, 527 U.S. 263, 281-282 (1999).

State Court Resolution

The Alabama Court of Criminal Appeals ruled against petitioner on all three prongs of the *Brady* claims as to each of the prosecutor's notes. The appellate court adopted the circuit court's finding that the notes were not suppressed because "[t]he record of the trial transcript shows that neither trial counsel filed a motion indicating that the prosecutor was in violation of [the circuit] court's order" requiring the prosecutor to maintain an open file. *Williams v. State*, 782 So. 2d 811, 819 (Ala. Crim. App. 2000). The court further concluded that the notes were not exculpatory and that the defense was not prejudiced by the lack of disclosure. The Parker note was deemed not to be

exculpatory because it only stated that the victim and the defendant *may* have been seen together, the origin of the information contained in the note was unknown, the note possibly contained triple or quadruple hearsay, and Williams failed to "present any admissible evidence to show that the information contained in this note could have been presented to the jury in some way." *Id.* at 820. The Nixon notes were found not to be exculpatory because the evidence derived from those notes--John Nixon's testimony at the Rule 32 hearing was not helpful to the defense. Nothing in these notes or in Nixon's testimony [ ] establishes that the white sports car he saw on November 2, 1988 was owned by Timothy. During his testimony at the Rule 32 evidentiary hearing, Nixon was not sure if the make of the car he saw that day was a Porsche." *Id.* Further, the court found that "nothing in the [ ] notes or in Nixon's testimony [ ] links this information with the victim or Williams." Finally, the court credited the testimony of Carolyn Hasser, the victim's sister-in-law, which placed the victim and his car in Mobile at the time Nixon saw the sports car in Creola. The court concluded that the petitioner had failed to establish that any of the notes were material. The only reason given for this conclusion was that the Parker note was inadmissible and could not have been submitted to the jury.

Discussion

Petitioner argues that the state court's decision regarding his *Brady* claims was an unreasonable application of the law with respect to the suppression prong and both contrary to and an unreasonable application of clearly established law with respect to the remaining prongs of the *Brady* analysis. The state

court's decision is due to be upheld as to both the suppression and prejudice prongs of the *Brady* analysis.[11]

Citing *Banks v. Dretke.*, 540 U.S. (2004) and *Strickler v. Greene*, 527 U.S. 263 (1999), petitioner points out that a prosecutor's failure to include exculpatory materials in an "open file" amounts to suppression. According to petitioner, the state court erroneously and unreasonably found that no suppression had occurred because defense counsel had neglected their duty to object to the prosecutor's failure to disclose documents. Petitioner points out that the Supreme Court in *Banks* and *Strickler* has made clear that omission of exculpatory evidence, standing alone, amounts to suppression under *Brady* when discovery is "open file". But petitioner's argument miscontrues the facts found and addressed by the state court in this case. The court held:

> Both trial counsel [who] testified at the Rule 32 evidentiary hearing stated that they had not seen these handwritten notes. However, one of the trial counsel acknowledged that this court had ordered an open file discovery policy. Trial counsel added that he was 'not allowed to go to Mr. Galanos' office and go through his file.' . . .The record of the trial transcript shows that neither trial counsel filed a motion indicating that the prosecutor was in violation of this court's order,. . . which ordered the prosecutor to

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[11] Because all three elements must be satisfied in order for a defendant to prevail on a *Brady* claim, this Court need not address the state court's conclusion that the evidence was not exculpatory.

> have an open file. Therefore, Williams has not established by a preponderance of the evidence that these handwritten notes were suppressed.

Williams, 782 So. 2d at 819.

Thus, the state court found that petitioner's proof on the suppression issue was lacking. Since counsel had not filed a motion protesting the state's failure to comply with open file discovery, the court did not believe petitioner's claim that the entire file was not available to the defense.[12] No evidence was presented that the notes could not have been found if the file had been examined by defense counsel.[13] That makes this case significantly different from *Strickler* and *Banks* where the defendants' attorneys were given access to a file--represented to be the complete file--from which exculpatory information had been withheld or removed. Here, there is no evidence that defense counsel ever looked at the District Attorney's file themselves, even though they had access to it. Thus, there is no proof as

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[12] The record from pretrial and trial proceedings supports this conclusion. During a pretrial hearing, defense counsel Jay Kimbrough acknowledged that the D.A.'s file had been made available to him and that he had availed himself of it. (V. 2-91.) More specifically, during jury selection, District Attorney Galanos stated to the court that he had informed defense counsel that "I'll be in my office all day Sunday [prior to commencement of jury selection] and you're entitled to anything in my files." (V. 3-275.) In response, defense attorney Wilson stated that he was not aware of this, but co-counsel Lackey stated, "I was, Judge." (*Id.*)

[13] Defense counsel did not recall seeing the statements before the Rule 32 proceedings, but they appeared to have relied on the prosecutor to provide them with copies of the file. There is no evidence that the District Attorney represented these copies to be the complete file.

to what was, or was not, in the District Attorney's file which was available to the defense--and no evidence that the notes were suppressed. The state court's conclusion on the suppression prong was not contrary to or an unreasonable application of *Strickler* or *Banks*.

Petitioner fares no better with his argument that the state court unreasonably applied *Brady* 's prejudice prong. A defendant suffers prejudice when exculpatory information is withheld if the evidence is "material either to guilt or punishment." *Brady*, 373 U.S. at 87. "[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id*. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *United States v. Bagley*, 473 U.S. 667, 681 (1985). The state court found that the notes were not material because petitioner failed to establish that any of the notes would have been admissible or would have led to admissible evidence.[14] Petitioner argues that this conclusion was an unreasonable application of the law

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[14] Both the Nixon notes and the Parker note were hearsay and, therefore, inadmissible. Nixon himself testified at the Rule 32 hearing, and his testimony was different from the note. At the hearing, Nixon testified that on the day of the murder he saw a light colored sports car parked in front of a metal building, an unoccupied business, on Highway 43 in Axis, Alabama. (V. XIII at 83.) While he may have told the Creola Police Department that the vehicle was a Porsche, he thought it was a Mazda at the time. *(Id.* at 89.) Interestingly, petitioner argues that the Nixon notes were material, but he is silent as to the materiality of Nixon's actual testimony. He does not argue that the state court was unreasonable in its conclusion that Nixon's testimony was neither exculpatory or material

because "nothing in *Brady* requires evidence to be admissible to be considered material for *Brady* purposes." (Pet.'s Merits Brf, Doc. 45, at 55.) While that may be true, it is also true that neither *Brady* nor *Bagley* compel, or even suggest, the opposite conclusion, *i.e.*, that admissibility has no effect on materiality. Because materiality is defined in terms of the probable affect on the proceedings, it is not unreasonable to conclude that only admissible, or potentially admissible, evidence is material. In fact, as petitioner acknowledges, the Eleventh Circuit has adopted a definition of materiality identical to the one applied by the state court. *See Spaziano v. Singletary*, 36 F.3d 1028, 1044 (11th Cir. 1994) ("A reasonable probability of a different result is possible only if the suppressed information is itself admissible evidence or would have led to admissible evidence. Otherwise, the suppression of the information could not have affected the basis of the verdict, which is the evidence the factfinder heard.") The state court's finding that petitioner suffered no prejudice from the alleged *Brady* violations was not unreasonable.

Claim B: *Batson* Claims

Review of the state court's ruling on petitioner's *Batson* claims is made more challenging because the issues raised in petitioner's merits brief are not the issues that were raised in state court and preserved for habeas review. To understand the difference between the claims argued here and the claims actually raised and decided in state court, it is first necessary to review the requirements of *Batson*.

Batson v. Kentucky

In *Batson v. Kentucky*, 476 U.S. 79 (1986), the

Supreme Court held that the use of peremptory challenges to exclude potential jurors on the basis of race violates the Equal Protection Clause of the United States Constitution. The burden is on a defendant to prove that the prosecutor engaged in purposeful discrimination. *Id.* at 96. A challenge to the jury made pursuant to *Batson* has three distinct steps. First, the defendant must establish a prima facie case of discrimination. *Id.* at 97. If the defendant makes the requisite showing, then the burden shifts to the prosecution to come forward with a race-neutral explanation for its peremptory challenges. *Id.* At this point, the prosecutor's proffered reasons "need not be 'persuasive or even plausible...the issue is the facial validity of the prosecutor's explanations.'" *McNair v. Campbell,* 416 F.3d 1291, 1310 (11th Cir. 2005 (quoting *Purkett v. Elem,* 514 U.S. 765, 768 (1995) (internal quotation omitted)). Once both parties have satisfied their initial burdens, then "the trial court has the duty to determine if the defendant has established purposeful discrimination." *Batson,* at 98. At this stage of the inquiry, "'the decisive question will be whether counsel's race-neutral explanation . . . should be believed.'" *McNair,* at 1310 (quoting *Hernandez v. New York*, 500 U.S. 352, 365 (1991) (plurality opinion)).

The State Court Ruling

In its order on direct appeal affirming the petitioner's conviction, the Alabama Supreme Court entered the following ruling regarding petitioner's *Batson* challenge:

> Williams also argues that the state violated *Batson v. Kentucky*. . . in using peremptory strikes to remove four blacks from the jury

> venire. The reasons proffered by the State for those four strikes were that an arrest warrant was pending with regard to one of those veniremembers; that one of them knew a defense witness; that one had been arrested for harassment; and that the other admitted to [f]ighting, cutting, saying, 'I've been cut. I've got cut and I've cut people." In justifying his strike of the latter veniremember, the district attorney stated that the veniremember's statement indicated illegal activity.
>
> A connection with or a founded suspicion of criminal activity can constitute a sufficiently race neutral reason for the exercise of a peremptory strike. . . . We have considered the prosecutor's reasons for striking the four blacks on the jury venire, and we find all the reasons to be race-neutral.

Williams, 627 So. 2d at 1004-05 (internal quotations and citations omitted).

Identifying Petitioner's *Batson* Claims

Petitioner's *Batson* claim or claims have been somewhat amorphous. While the claim raised in the amended habeas petition is stated broadly enough to encompass all three steps of *Batson* review, the *Batson* issue raised by petitioner before the Alabama Supreme Court and addressed by that court on direct review was much narrower. In his amended habeas petition, petitioner asserts, generally, that "the prosecutor utilized his peremptory challenges in a racially discriminatory manner." (Am. Pet. at 39.) Petitioner alleges facts to support a prima facie case (the first *Batson* step) and also asserts that the reasons offered

by the prosecutor either were not facially neutral (the second *Batson* step) or "are either contrary to or unsupported by the record" (the third *Batson* step). *(Id.* at 40.) In his appeal to the Alabama Supreme Court, petitioner challenged the trial court's ruling only as to the second *Batson* step, that is, whether "[t]he trial court['s] finding that the prosecution's proffered reasons for its peremptory strikes of African American jurors were race neutral." (R. Vol. X, 104.) That question--whether reasons were race-neutral--is the question that the Alabama Supreme Court answered in its opinion.

In his merits brief, petitioner has given the *Batson* claim a different twist. After demonstrating how he has satisfied *Batson's* first step--the prima facie case requirement--petitioner argues that the lack of a record of portions of the jury selection process makes a full *Batson* analysis impossible. Specifically, petitioner contends that missing record prevents him from determining whether the prosecutor's proffered race-neutral reasons also applied to whites who were seated as members of the jury, *i.e.*, the third *Batson* step. Petitioner argues that his conviction is due to be reversed because he has been prejudiced by the lack of a record.

Much of petitioner's *Batson* challenge is precluded by the doctrines of exhaustion and procedural default. First, petitioner's claim that the incomplete transcript entitles him to relief for violation of due process is not a *Batson* claim and has never before been raised. In fact, in his Stage I brief before this Court, petitioner affirmatively argued that references to the missing transcripts were not intended to state a separate

claim.[15] Because petitioner never raised this claim in state court, he has failed to satisfy the exhaustion requirement. *Snowden v. Singletary,* 135 F.3d 732, 735 (1998) (state prisoner must first present federal claims to the state courts so that state has opportunity to correct alleged federal constitutional violations). When the federal court determines that exhaustion would be futile, then an unexhausted claim need not be returned to state court. *Id.* at 736. Here exhaustion would be futile because Alabama procedural default rules preclude consideration of a claim that was not raised on direct appeal. Ala. R. Crim. P. 32.2(a)(5). To the extent that petitioner has raised a challenge based on the third step of the *Batson* analysis, that claim likewise due to be denied on exhaustion and procedural default grounds. Petitioner's sole state court *Batson* claim was directed at the second *Batson* step-- whether the prosecutor's reasons were race neutral.

In his merits brief, petitioner has not addressed the only *Batson* claim that has been preserved for federal habeas review, *i.e.*, that the trial court erred at step two of the *Batson* analysis. In any event, he is not entitled to relief on that claim. "Unless discriminatory intent is inherent in the prosecutor's explanation, the

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[15] Specifically, petitioner stated: "[t]he footnote [pointing out the missing trial transcript] in no way pleads a new claim or introduces new evidence; it simply points out an omission in the trial transcript and explains the use of alternative sources of information concerning the prosecution's use of peremptory strikes, while noting the standard or review applicable when the state record is incomplete." (Petr.'s Stage I Brf, Doc. 28, at 20.) Based on that assertion, this Court initially found the state's exhaustion/procedural default defense on this issue to be moot. The defense is no longer moot.

reason offered [at step two] will be deemed race neutral." *Purkett v. Elem*, 514 U.S. 765, 768 (1995) (per curiam) (quoting *Hernandez*, 500 U.S. at 360). The prosecutor's reasons for striking the four African-American jurors were: (1) one juror had a pending arrest warrant; (2) one juror knew a defense witness; (3) one juror had been arrested for a misdemeanor and (4) one juror admitted to criminal activity. The trial court's factual determination that these reasons were race-neutral was not objectively unreasonable, nor was the court's legal analysis contrary to or an unreasonable application of clearly established Supreme Court law.[16]

Claim C: Ineffective Assistance of Counsel

The amended petition sets out eight claims based on Sixth Amendment violations arising from ineffective assistance of counsel. In addition, petitioner's merits brief asserts an additional ineffective assistance claim not raised in the amended petition. The claims are based on various purported errors of counsel from the pretrial stage through appeal. Before addressing each of those claims below, the Court sets out the legal framework for evaluating a post-conviction ineffective assistance of counsel claim.

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[16] The Court has addressed this claim out of an abundance of caution, even though petitioner has not pursued it in his merits brief. Since the claim has not been briefed, petitioner has not specified whether the claim arises under 28 U.S.C. § 2254(d)(1) or (d)(2). Other than *Batson*, petitioner has identified no clearly established Supreme Court law related to this specific claim.

The Controlling Legal Principles–*Strickland v. Washington* and its Progeny

In *Strickland v. Washington*, 466 U.S. 668 (1984), the Supreme Court established a two-part test for determining whether counsel's representation was so deficient as to violate the defendant's right to counsel guaranteed by the Sixth Amendment. First, "petitioner must show that counsel's representation fell below an objective standard of reasonableness." Second, "petitioner must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Chandler. v. United States,* 218 F.3d 1305, 1312-13 (11th Cir. 2000) (en banc) (internal quotations and citations omitted).

Evaluation of the first prong of an ineffective assistance claim, the reasonableness of counsel's performance, is guided by the principles set forth by the Eleventh Circuit in *Chandler*. First, the standard is *reasonableness* under the prevailing norms of the legal profession. *Id.* at 1313. The question is not whether counsel did what was possible or even what was prudent but whether he did what was "constitutionally compelled." *Id.* The burden of persuasion is on the petitioner to prove by a preponderance of competent evidence that counsel's performance was unreasonable. *Id.* Review of counsel's performance must be highly deferential, and there is a "strong presumption" of reasonableness. *Id.* at 1314. That presumption is even stronger if petitioner was represented by experienced trial counsel. *Id.* at 1315. Nothing looks the same in hindsight; therefore, the Court must evaluate the reasonableness of counsel's performance from counsel's perspective at trial. *Id.* at 1316. No absolute rules

dictate what is reasonable. *Id.* at 1317. Hence, counsel has no absolute duty to investigate particular facts or a certain line of defense. *Id.*

Even when an attorney is shown to have performed unreasonably in his representation of a defendant, it is just as likely as not that his error was harmless. *Johnson v. Alabama*, 256 F.3d 1156, 1177 (11th Cir. 2001). Therefore, a petitioner has a difficult burden to prove the prejudice prong of his ineffective assistance of counsel claims. *Id.* As noted, prejudice requires proof that "'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Id.* (quoting *Strickland v. Washington*, 466 U.S. at 694). A "reasonable probability is a probability sufficient to undermine confidence in the outcome of the proceedings.'" *Id.* It is not enough to show that the error had "some conceivable effect;" rather, the error must be so egregious as to render the trial unfair and the verdict suspect. *Id.*

With the passage of AEDPA, Congress further restricted federal review of a state petitioner's ineffective assistance of counsel claims. When an ineffective assistance of counsel claim is raised in a § 2254 proceeding, "another layer of deference [is added]--this one to the state court's decision. [Petitioner] must do more than satisfy the *Strickland* standard. He must also show that in rejecting his ineffective assistance of counsel claim the state court 'applied *Strickland* to the facts of his case in an objectively unreasonable manner.'" *Rutherford v. Crosby*, 385 F.3d 1300, 1309 (11th Cir. 2004) (quoting *Bell v. Cone*, 535 U.S. 685, 689 (2002)).

As discussed previously, AEDPA permits a federal court to overturn a state court conviction or sentence on habeas review only if (1) the state court's factual determination was unreasonable (2) its decision was contrary to clearly established law, or (3) its application of the law was unreasonable. Generally, where a state court applies the *Strickland* standard to an ineffective assistance of counsel claim, its decision cannot be found to be contrary to clearly established federal law. *See, e.g., Wellington v. Moore,* 314 F.3d 1256, 1260 (11th Cir. 2002 (state court correctly identified *Strickland* standard and, therefore, applied controlling legal principles as required by AEDPA); *Putnam v. Head,* 268 F.3d 1223, 1242 (11th Cir. 2001) (same). Thus, to succeed on an ineffective assistance of counsel claim, a petitioner normally must show either that the state court unreasonably applied *Strickland* to the facts it found *or* that the state court's findings of fact were themselves unreasonable. In addressing his ineffective assistance claims, petitioner often ignores these requirements. In some instances he relies on facts different from, or contrary to, those found by the state court (without demonstrating the factual determination to be unreasonable). In others, he argues the merits of his ineffective assistance of counsel claim but does not attempt to demonstrate how or why the state court unreasonably applied *Strickland*. Each of petitioner's ineffective assistance of counsel claims is discussed below.

Claim C(a): Counsel's Failure to Investigate and Present Evidence Supporting the Motion to Suppress Statements

Petitioner's mother, Arcola Williams, testified at the Rule 32 hearing that Agent Barnett had, in effect,

induced Mrs. Williams and her husband to persuade petitioner to give a third statement after petitioner had invoked his right to counsel. This evidence was not presented at the suppression hearing. In his Rule 32 petition, petitioner argued that his attorneys rendered constitutionally ineffective assistance because they failed to discover Mrs. Williams' testimony about the conversation with Barnett and present it at the suppression hearing.[17] The state court found insufficient evidence to satisfy either *Strickland* prong. As to the reasonableness of counsel's actions, no evidence was presented that counsel did not attempt to discover information of this type or that counsel knew about the evidence and failed to present it at the suppression hearing. *Williams*, 782 So. 2d at 832. Hence, the state court concluded that counsel's conduct did not fall outside the range of reasonableness expected of competent counsel. With respect to *Strickland's* prejudice prong, the state court found that petitioner was not prejudiced because "there [wa]s no reasonable probability that, if trial counsel had presented Mrs. Williams' testimony, the result of the decision on the motion to suppress ... would have been different." *Id.* at 833. Specifically, the court found "[in]sufficient evidence to indicate that there was any State action before petitioner reinitiated contact with police." *Id.* In other words, the state court did not believe Mrs. Williams' version of events.

Petitioner argues that his attorneys' alleged failure to investigate satisfies the first *Strickland* prong and

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[17] Petitioner asserts that the evidence proves an *Edwards* violation and would have led to the suppression of his third statement and any evidence resulting from it.

that the state court's decision to the contrary "contravenes clearly established federal law." (Petr's Brf. at 88.) The state court's decision is not contrary to clearly established federal law because it neither "contradicts the governing law set forth in [the Supreme Court's] cases" nor "arrives at a result different from" Supreme Court precedent involving materially identical facts. *Williams v. Taylor*, 629 U.S. 362, 405-06 (2000). First, the state court followed *Strickland*--the Supreme Court's standard for deciding ineffective assistance of counsel claims. Second, neither of the Supreme Court cases cited by petitioner involved similar, much less identical, facts. In both *Rompilla v. Beard*, 545 U.S. 374 (2005), and *Wiggins v Smith*, 539 U.S. 510 (2003), trial counsel failed to uncover *existing* exculpatory evidence. Here, the Rule 32 court rejected the factual basis for petitioner's claim; therefore, there was no exculpatory evidence for counsel to find.

To the extent that petitioner's argument could be interpreted as a claim that the state court unreasonably applied *Strickland's* first prong, it would also fail. Petitioner's argument relies on facts discounted by the state court. Specifically the court found that "no evidence ha[d] been presented that trial counsel did not investigate for this type of evidence, or that any of this information was communicated to trial counsel." *Williams*, 782 So. 2d at 831. In other words, the state court found that petitioner failed to meet his burden of proof as to the alleged lack of investigation.

Petitioner does not address the state court's holding regarding the second *Strickland* prong but, instead, attempts to argue the prejudice issue anew.[18] The state

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[18] As discussed above, this Court must defer to the state court's

court found petitioner was not prejudiced by counsel's failure to present the evidence at the suppression hearing because there was insufficient evidence to indicate that there was any state action before Williams reinitiated contact with police.[19] Petitioner has made no attempt to demonstrate that this factual finding was unreasonable. Since the court found that petitioner's statement was not initiated by state action, there was no legal basis for suppressing the statement and the state court correctly concluded that no prejudice had resulted from counsel's failure to discover and present the evidence.

Claim C(b): Counsel's Failure to Engage in Effective Voir Dire with Venire Members Who Opposed Death Penalty

Petitioner argues that counsel failed to engage in thorough and effective voir dire of jurors who expressed opposition to the death penalty. As to this issue, the state appellate court ruled that "contrary to the appellant's assertion, the record of his trial shows that his attorneys did indeed question and attempt to rehabilitate each of the four veniremembers to whom the appellant refers in his brief. However, the trial

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application of *Strickland*. Again, the question to be decided on federal review under § 2254(d) is not whether counsel was ineffective under *Strickland* but whether the state court unreasonably applied *Strickland* to the facts of this case.

[19] The state court did not explain the precise factual basis of its finding of the lack of state action. It could be that the court found a lack of evidence that Mrs. Williams communicated Barnett's statements to the petitioner; hence, the state action did not induce petitioner's statement. It could also be that the court disbelieved Mrs. Williams' version of events and found that Barnett never made the statement at all.

court properly excused those veniremembers for cause because each stated that he or she would not vote to impose the death sentence under any circumstances." *Williams*, 782 So. 2d at 833. In his brief before this Court, petitioner, again, argues the merits of ineffective assistance of counsel claim without attempting to demonstrate why the state court's decision in this regard was an unreasonable application of clearly established federal law. Moreover, petitioner's argument relies heavily on a conclusory assertion, *i.e.*, that counsel did not "adequately" question the four jurors who were excused.[20] The state court found otherwise, and petitioner has failed to explain, much less persuade this Court, why the state court's legal or factual determinations were unreasonable.[21]

Claim C(c): Counsel Failed to Assert Challenge for Cause Against Biased Venire Members

Petitioner also alleges that counsel was ineffective

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[20] Indeed, after reviewing the record and the questions posed by defense counsel, it is difficult to conceive what petitioner would consider adequate. *See* R. Vol. III, 149-52, 158-59, 165-69. Petitioner's standard would certainly be higher than the wide range of reasonableness set by *Strickland*.

[21] Petitioner's brief also confuses the facts regarding voir dire. Petitioner acknowledges in his factual summary that defense counsel did pursue voir dire as to the four veniremembers who expressed opposition to the death penalty. However, his legal argument asserts different, nonexistent facts. Specifically, petitioner contends that counsel's performance was deficient because trial counsel made no efforts whatsoever at their rehabilitation and lodged no objection to their being excused for cause. Both of these allegations, *i.e.*, no efforts to rehabilitation and no objection to the excuse for cause, are contrary to the record. *See* R. Vol. III, 149-52, 158-59, 165-69.

at jury selection because they failed to engage in thorough and effective voir dire of jurors who demonstrated bias towards the prosecutor's version of the facts, specifically, the prosecution's theory that petitioner had murdered the victim in order to steal his car.[22] The state appellate court rejected this claim, stating: "[A]gain contrary to the appellant's assertion, the record of the appellant's trial shows that his attorneys did indeed question each of the four veniremembers about any potential they may have had in favor of the prosecution or against him. Upon further questioning, each veniremember stated that she could set aside what she had heard about the case and decide the case based solely on the evidence presented from the witness stand." As with the previous claim, petitioner presents this claim as though there were no state court decision to review and fails to demonstrate why the state court's legal or factual determinations are unreasonable.

Claim C(d): Trial Counsel's Failure to Object to Prosecutor's Comments

Petitioner argues that trial counsel rendered constitutionally ineffective assistance because they failed to object to several allegedly improper comments by the prosecutor. The amended petition sets forth four objectionable comments: (1) that the defendant was a "predator" (2) that the defendant had more rights than the victim; (3) that the victim had no black friends; and (4) that defendant's multiple statements indicated

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[22] In response to questioning, four veniremembers stated that, based on what they learned from media coverage of the case, they believed the victim's car had been stolen.

guilt.[23] Petitioner contends that all of these statements were inflammatory and without evidentiary foundation. In addition, petitioner contends that the fourth comment impermissibly shifted the burden of proof to the defendant. In his merits brief, petitioner states the third comment differently, that is, that the prosecutor stated that the *defendant* had no *white* friends. Petitioner raised these claims in his Rule 32 petition and in his Rule 32 appeal. The state court ruled that none of the comments were improper and that no prejudice had resulted. *Williams,* 782 So. 2d at 835-36. That decision was not unreasonable because the comments did not violate petitioner's due process rights.

Even though petitioner's claim is directed at counsel's failure to object to the prosecutor's comments, rather than the comments themselves, the starting point for analyzing the ineffective assistance claim is whether the comments violated petitioner's right to due process. *See United States. v. Miles,* 53 Fed. Appx. 622, 630 (3d Cir. 2002); *United States* v. *Lively,* 817 F. Supp. 453, 464 (D. Del.1993) "[A] meritorious due process claim based on the [prosecution's] improper summation is a necessary component of a successful Sixth Amendment claim based on defense counsel's failure to object to the summation." *Lively,* at 464. A prosecutor's remarks do not result in the denial of due process unless those remarks "so infected the trial with

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[23] In his brief, petitioner presents a third improper argument/ineffective assistance claim based on the prosecutor's reference to God, the Bible and religion. This claim was not asserted in the amended petition, and petitioner has neither sought nor been granted leave to amend. For that reason, this ineffective assistance claim is denied.

unfairness as to make the resulting conviction a denial of due process." *Donnelly v. DeChristoforo,* 416 U.S. 637, 643 (1974). In *Darden v. Wainwright,* 477 U.S. 168 (1986), the Supreme Court held that the prosecutor's closing argument, though "deserv[ing] [of] the condemnation it has received from every court to review it," did not violate the narrow due process standard applicable on habeas review. *Id.* at 180. Several factors influenced the court's conclusion. First, "the prosecutors' argument did not manipulate or misstate the evidence, nor did it implicate other specific rights of the accused such as the right to counsel or the right to remain silent." *Id.* at 181-82. Moreover, "[m]uch of the objectionable comment was invited by or was responsive to the opening summation of the defense." *Id.* at 182. In addition, the jury was instructed that counsel's argument was not evidence and that their decision was to be based on the evidence. Finally, because the evidence against the defendant was substantial, the likely impact of the prosecution's argument was reduced.

Applying the due process standard to the prosecutor's remarks in this case, it is clear that no violation occurred. The prosecutor's description of petitioner as a predator was a fair characterization of the evidence and was intended to counter defense counsel's argument that the defendant and the victim knew each other. The prosecutor argued that some personal facts the defendant knew about the victim were likely learned as the defendant, who meticulously planned the crime, surprised his victim and forced him from his home at gunpoint. That the defendant had more rights than the victim was not a misstatement or a manipulation of the evidence and was invited

response to defense counsel's argument that the police badgered the defendant into giving statements. Petitioner argues forcefully that the prosecutor's argument that the defendant had no white friends is without evidentiary support, a factor that would weigh in favor of finding due process violation. The record does, however, support the prosecutor's argument.[24] Petitioner contends that the presumption of innocence was undermined by the prosecution's argument that the defendant's four exculpatory statements should be considered as of his guilt. The argument was based on a logical inference from the evidence[25] and "undermined" the presumption of innocence only to the extent that it properly pointed out evidence from which the jury could find the presumption had been overcome. To the extent that any of the prosecutor's comments might be considered improper, the negative effect would have been ameliorated by the trial court's instructions[26] and by the overwhelming evidence of the

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[24] The confusion arises from the fact that the prosecutor attributed the testimony to the wrong witness. The prosecutor argued that Darrell Powell, a friend of the defendant, testified that the defendant had no white friends. In the Rule 32 appeal, the Alabama Court of Criminal Appeals cited Powell's testimony as evidentiary support for the prosecutor's argument. *Williams*, 782 So. 2d at 836. In fact, Powell was asked only whether the defendant had a white friend named Tim Hasser. Another prosecution witness, Israel Kennedy, was asked whether the defendant "ever mention[ed] that he had any white friends?" Kennedy replied, "No, I never seen him with anyone." (R. Vol. IV, 131.) Thus, despite the incorrect citation, the state court's factual finding is not unreasonable.

[25] One might reasonably conclude that only someone who was guilty would have given such inconsistent, contradictory and implausible statements.

[26] With respect to counsel's closing arguments, Judge McRae

defendant's guilt.

In sum, the prosecutor's closing arguments did not violate defendant's due process rights. Consequently, trial counsel's failure to object to those arguments was neither objectively unreasonable nor prejudicial to the petitioner. The state Court's decision as to this claim was neither contrary to nor an unreasonable application of clearly established law

Claim C(e): Trial Counsel's Failure to Object to Jury Instructions

Petitioner asserts that trial counsel rendered constitutionally ineffective counsel because they failed to object to guilt-phase jury instructions on reasonable doubt and the voluntariness of defendant's statements. With respect to the reasonable doubt instruction, petitioner argues that counsel should have objected to instructions that required the jury to "justify an acquittal ...[by] an actual and substantial doubt and not merely a possible doubt." According to petitioner, the trial court's instruction was improper and prejudicial based on the Supreme Court's decision in *Cage v. Louisiana*, 498 U.S. 39 (1990). The Rule 32

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instructed the jury that the attorneys "have a right to draw inferences and conclusions from the facts as they remember those facts to be. But also on day one, I told you that you would be the sole tryers of the facts in this case. And if any attorney has argued to you facts, inferences, or conclusions from those facts, different from what you yourself would draw, then I tell you to totally disregard it because again, you're the sole tryers of the facts in this case." (Vol. VII at 88-89.) Judge McRae further instructed that the verdict "must be based upon the evidence and just and reasonable inferences from that evidence. Furthermore, you must not permit sympathy, prejudice, or emotion to influence you in any way." (R. Vol. VII 107.)

court rejected this ineffective assistance of counsel claim because the underlying substantive claim--the validity of the reasonable doubt instruction in light of *Cage*-- was raised by the defendant on direct appeal and decided in the state's favor. *Williams*, 782 So. 2d at 837. The state court did not unreasonably apply clearly established ineffective assistance of counsel law because failure to raise a nonmeritorious objection does not amount to ineffective assistance. *Bolender v. Singletary*, 16 F.3d 1547, 1573 (11th Cir. 1994) ("axiomatic that failure to raise non-meritorious issues does not constitute ineffective assistance").

As to counsel's failure to object to the voluntariness instruction, the Rule 32 court held that trial counsel's actions were neither unreasonable nor prejudicial because the instructions were not improper. Petitioner argues here, as he did before the Rule 32 court, that the instructions were improper because they informed the jury that the judge had determined the confession to be voluntary and suggested that the jury should give great weight to the defendant's statements. The state court found, not unreasonably, to the contrary. Petitioner relies on *Ex Parte Singleton*, 465 So. 2d 443 (Ala. 1985), in support of the proposition that "[i]t is improper for a trial judge to disclose to the jury that he made a preliminary determination that a confession was voluntary and, therefore, admissible." *Id.* at 446. But, in *Singleton* the trial court's instruction was found *not* to be prejudicial even though the judge told the jury that he had made a preliminary decision on voluntariness and had admitted the statement into evidence. No prejudice ensued because the trial judge followed that statement with a clear instruction that the jury, not the judge, was the trier of fact and that

the burden was on the state to prove that the statement was voluntary. *Id.* The trial judge in this case explained to the jury that "the burden is first upon the court to determine [questions related to voluntariness] for the purpose of admitting the statement or refusing its admission into evidence." (R. Vol. VII ,104-05.) However, just as in *Singleton*, he immediately followed that statement with a clear instruction that the jury was to determine the question of voluntariness.[27]

Claims C(f), (g) & (h): Failure to Investigate and Present Mitigation Evidence

Petitioner claims that trial counsel were constitutionally ineffective at sentencing because they failed to investigate and present two types of additional mitigation evidence. First, petitioner alleges that counsel failed to present an adequate picture of the childhood abuse, violence and trauma he suffered at the hands of his father and, to a lesser extent, his mother. The only defense witness at the sentencing hearing was petitioner's mother, who testified at the hearing about childhood abuse inflicted upon petitioner by his father. At the Rule 32 hearing, petitioner presented evidence from three additional witnesses--his uncle, his aunt and his half- sister--which painted a more detailed picture of the horrific abuse inflicted by his alcoholic father on all members of the family, including the petitioner. Each of these witnesses

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[27] In this connection, the burden is on the State to satisfy you, the jury, beyond a reasonable doubt that the confession or statement against interest of the Defendant was a voluntary statement and was given by him without fear of punishment or hope of reward ..." (R. Vol. VII, 104-05.)

testified that he or she would have testified at the sentencing phase but that defense counsel never contacted them. The second type of mitigation evidence presented at the Rule 32 hearing was the expert testimony of Dr. Gelwan, who diagnosed the petitioner as suffering from Post-Traumatic Stress Disorder (PTSD) resulting from childhood trauma and abuse.

Judge McRae, the sentencing judge, presided over the Rule 32 hearing. After hearing the additional mitigation evidence, Judge McRae concluded that counsel's investigation and presentation of mitigation evidence was not unreasonable and that no prejudice had resulted from the omission of the mitigation evidence at sentencing. Judge McRae found that counsel did investigate and present evidence of abuse and that counsel's investigation and presentation of mitigation evidence was not objectively unreasonable because the omission of this evidence at sentencing was not prejudicial since there was no "causal relationship" between the abuse and the murder. He further elaborated that "any additional testimony. . . that [petitioner] was physically abused by his father has little mitigation value due to the fact that this was a deliberately planned crime where the victim was murdered because [petitioner] wanted his car." *Williams*, 782 So. 2d at 827. Similarly, Judge McRae found no prejudice from the failure to present the testimony of Dr. Gelwan at the sentencing hearing because it "would not have resulted in . . . a sentence other than death. There is no reasonable probability that the sentencer would have concluded that the balance of aggravating and mitigating circumstances did not warrant a death sentence." The Alabama Court of Criminal Appeals adopted Judge McRae's opinion on

these issues.

Petitioner argues that the state court made "three errors of law" in its decision denying relief based on counsel's failure to investigate and present the additional mitigating evidence set forth above. First was the "their failure to conclude that trial counsel's investigation was insufficient under *Strickland.*" (Pet.'s Merits Brf. at 150.) Second was the conclusion that petitioner was not prejudiced by counsel's failure to present additional mitigating evidence. Third, petitioner alleges that the state courts erroneously required that the petitioner show a "nexus" between the mitigating evidence and the murder.[28] As with many of his prior claims, petitioner cites Supreme Court law but does not explicitly rely on either the "contrary to" or the "unreasonable application" prong of § 2254(d)(2). Petitioner contends that the state court was wrong and apparently leaves it to this Court to figure out how those allegedly wrong decisions meet § 2254's standard of review.

Layering the standard of review set by § 2254(d)(2) on top of the *Strickland* standard for reasonably competent counsel as defined by the Eleventh Circuit in *Chandler*, the first question presented is whether the state court reasonably concluded that the petitioner failed to overcome the strong presumption that counsel's actions--in this case their mitigation investigation which failed to yield additional abuse evidence or expert psychological testimony--was reasonable. *Chandler* at 1314-15. The presumption of

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[28] Petitioner does not specify whether this argument goes to the reasonableness prong or the prejudice prong of the *Strickland* analysis.

reasonableness is overcome only if counsel was "constitutionally compelled" to investigate further. *Id.* Judge McRae held that the counsel's investigation--both with respect to abuse evidence and expert testimony--was adequate. In other words, petitioner's evidence did not overcome the presumption of reasonableness. In this case, unlike the cases cited by petitioner, the record is virtually silent as to counsel's sentencing phase investigation. Evidence at the Rule 32 hearing established that: (1) the three family members who testified regarding abuse--petitioner's half-sister, aunt and uncle--would have been available to testify at the sentencing phase but were never contacted by trial counsel; (2) Mr. Lackey recalled having talked to petitioner's aunt or mother regarding penalty phase mitigation evidence;[29] (3) Mr. Wilson recalled that Mr. Lackey was in charge of the penalty phase preparation; (R. Vol. XIII, 144) and (4) Mr. Lackey did not consider calling Dr. Van Rosen to testify at sentencing because "his report indicated that there were not --that other than some borderline problems in intelligence and so on, that there was nothing basically wrong with Mr. Williams and that the testing was--was felt somewhat skewed by a lack of effort or attempts to confuse the tester by Mr. Williams." (R. Vol. XIII. 53.) The foregoing is the only Rule 32 evidence from which

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[29] Questioning of Mr. Lackey regarding the sentencing preparation was vague. Counsel asked Lackey to "briefly [ ] tell us what you did in preparation for the sentencing phase. Mr. Lackey responded: "I don't recall that we did anything in particular that we hadn't already done." (R. Vol. III, 54.) After being interrupted by Judge McRae, Mr. Lackey recalled that petitioner's motion testified about "some things in his background or his childhood that we felt would be helpful or give sympathy to Mr. Williams." (*Id.* at 54-55.)

one might glean anything at all about the mitigation investigation.

Petitioner has cited three Supreme Court cases as clearly establishing the law with respect to counsel's duty to investigate.[30] In contrast to the evidence here, each of those cases provides detailed account of counsel's shortcomings. In *Rompilla v. Beard*, 545 U.S. 374, 125 S. Ct. 2456 (2005), the Supreme Court recognized that there was "room for debate about trial counsel's obligation to follow . . . potential lines of enquiry" with respect to mitigation evidence." *Id.*, 125 S. Ct. at 2654. But the Court did not decide that issue because "a further point [wa]s dispositive: the lawyers were deficient for failing to examine the court file on Rompilla's prior conviction." *Id.* In *Wiggins v. Smith*, 539 U.S. 510 (2003), trial counsel chose to pursue a bifurcated sentencing that would have allowed them to argue, first, that the defendant was not directly responsible for the murder. If that issue were decided against the defendant, then they would present mitigation evidence. The motion to bifurcate was denied. At sentencing counsel relied on defendant's lack of direct involvement and presented *no* mitigation evidence, other than his lack of criminal history. The court of appeals found that counsel's decision to rely on lack of involvement, rather than mitigation, at sentencing was a strategic one and, therefore, entitled to deference. The Supreme Court reversed, holding that the decision was made without sufficient investigation into the defendant's dysfunctional background. The

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[30] Two of those cases-*Rompilla* and *Wiggins*-cannot be relied on as precedent under § 2254(d)(1) because they were decided after the denial of petitioner's Rule 32 petition became final. *See* discussion, *infra* p. 52.

evidence presented at the state habeas hearing established that counsel's investigation "fell short of the standards that prevailed in Maryland in 1989." *Id.* at 524. In addition, the little background evidence counsel did uncover should have caused them to look further; instead, counsel abandoned its investigation. *Id.* at 528. Finally, in *Williams v. Taylor*, 529 U.S. 362 (2000), defense counsel failed to discover and present mitigation evidence of horrific childhood abuse because counsel erroneously believed that they were not entitled to obtain commitment records from which this information was discovered. In each of those cases, what counsel did or failed to do--failing to examine a prior conviction (*Rompilla*), making a strategic decision without all the facts (*Wiggins*), failing to subpoena records due to a misunderstanding of the law (*Williams*)--is clearly set forth in the record. In each case, the result was a lack of mitigation evidence. Here, the record shows only the final result--the evidence that was not presented in mitigation. The record does not establish what counsel did or did not do in their investigation to reach that final result. Consequently, it is clearly insufficient to overcome the presumption of reasonableness afforded by *Strickland* and *Chandler*. "[W]here the record is incomplete or unclear about [counsel]'s actions, we will presume that he did what he should have done, and that he exercised reasonable professional judgment." *Chandler* at 1315.[31] Since the petitioner's evidence did not overcome the presumption of reasonableness, the state court did not unreasonably apply *Strickland's* reasonableness prong.

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[31] It is unclear how, or if, petitioner's claim that counsel failed to present mitigation evidence is separate from the failure to investigate.

Next, petitioner challenges the state court's ruling as to *Strickland's* prejudice prong. Because this is a judicial override case, petitioner's position amounts to a claim that Judge McRae unreasonably concluded that he would have imposed the same sentence even if all of the additional Rule 32 evidence had been presented at the sentencing phase. Of course, petitioner does not state his argument in these terms, and he has cited no clearly established law that would support such an anomalous argument. Instead, he presents an argument that is a complete non sequitur-that "[c]ounsel's failure to present thorough, coherent mitigation evidence at Mr. Williams' trial is particularly egregious in light of Judge McRae's well-known history of overriding juries' recommended sentences of life without parole." Petitioner points out cases in which Judge McRae had exercised his power of judicial override to sentence a defendant to death despite the jury's recommendation of life imprisonment. But Judge McRae's history of judicial overrides has no relevance to whether he would have reached the same result if additional evidence had been presented. In fact, the additional evidence *was* presented at the Rule 32 hearing, and Judge McRae did reach the same result.

Petitioner's final ineffective assistance/ mitigation argument is also presumably directed at the state court's holding as to *Strickland's* prejudice prong. Relying on *Tennard v. Dretke*, petitioner contends that Judge McRae and the Court of Criminal Appeals "use[d] an erroneous legal standard for judging the copious mitigation evidence presented at the Rule 32 hearing." (Petr.'s Merits Brf., Doc. 45 at 171.) Specifically, Judge McRae noted that there was no

"causal relationship" between the Rule 32 evidence of abuse and neglect and Williams' crime. *Williams,* 782 So. 2d at 826. According to petitioner, Judge McRae's "causal relationship" language was tantamount to imposing a "nexus" requirement between the mitigating evidence and the crime--a requirement that petitioner's asserts was rejected by the Supreme Court in *Tennard.*

Reliance on *Tennard* is misplaced for several reasons. First, *Tennard* was decided *after* the state courts concluded review of petitioner's Rule 32 petition. "[C]learly established federal law "refers to the holdings, as opposed to the dicta, of [the Supreme Court's] decisions *as of the time of the relevant state court decision.* " *Williams v. Taylor,* 529 U.S. 362, 382 (2000) (emphasis added). Second, no law was "clearly established" in *Tennard* because that case addressed the Fifth Circuit's decision to deny a certificate of appealability. The Supreme Court concluded only that the issue presented was debatable among jurists of reason and, therefore, that a certificate of appealability should have been granted. *Tennard,* 542 U.S. at 289. But the *Tennard* court was not called upon to, nor did it, decide the underlying issue.

Finally, the state court's decision--that petitioner was not prejudiced by the failure to present additional mitigation evidence--is not an unreasonable application of, nor is it contrary to. the proposition for which *Tennard* is cited. The underlying substantive issue in *Tennard* was whether the jury instructions allowed the jury to give appropriate consideration to the mitigating evidence. The Fifth Circuit concluded that the evidence relied upon by the defendant--evidence of his low IQ--was not relevant to mitigation because the defendant

had failed to show that his crime was attributable to his low IQ. Read in context, Judge McRae's observation about the lack of "causal relationship" goes to his assessment of the weight of the petitioner's additional abuse and neglect evidence, not to its relevance or to his ability to consider it at sentencing.

> In addition the evidence regarding Williams' background was never found to have a causal relationship with Williams committing capital murder. In the sentencing order, this court found that Williams "purposely and deliberately planned to enter the home of the victim, Timothy C. Hasser, await his arrival, and steal his automobile, a model 928 Porsche." . . . This court further stated in the sentencing order that the events which led to the murder of Timothy Hasser were not the product of chance; rather, these events were not planned and executed with military-like precision." . . . At trial, there was evidence presented that Williams was obsessed with the automobile owned by Timothy Hasser. Williams carried out his plan to take Hasser's Porsche by abducting the victim at gunpoint and killing him at a remote site and attempting to dispose of the body by throwing it into a river. *Any additional testimony offered by Williams at the Rule 32 evidentiary hearing that he was physically abused by his father has little mitigation value due to the fact that this was a deliberately planned crime where the victim was murdered because Williams wanted his car."*

Williams, 782 So. 2d at 827 (emphasis added). In summary, Judge McRae did not unreasonably refuse to consider petitioner's mitigation evidence, nor was his

analysis of that evidence contrary to clearly established law.

New Claim: Ineffective Assistance on Direct Appeal

In his merits brief, petitioner raises an claim for ineffective assistance of *appellate* counsel. This claim was not identified or addressed in the petition, in the amended petition or at any point in the procedural default stage. It is an entirely new claim. The appropriate method for asserting a new claim at this stage of the proceedings is by filing a motion for leave to amend. *See In re Hill,* 113 F.3d 181 (11th Cir. 1997) (Fed. R. Civ. P. 15(a) provides procedure for amending petition); Fed. R. Civ. P. 15(a) (after responsive pleading has been filed party may amend only with leave of court). Since leave to amend has not been sought or given, this ground cannot provide a basis for habeas relief.

Claim D: *Brady* Claim/Barnett Statement

This claim requires little discussion because it is based on evidence rejected by the trial court.[32] Petitioner contends that the prosecution failed to disclose to the defense that Agent Barnett had enlisted the help of Mr. and Mrs. Williams to obtain a statement from the petitioner. This is contrary to the

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[32] Interestingly, this claim was not raised in the Rule 32 petition, nor was it addressed by the Rule 32 court. However, it was raised in the Rule 32 appeal, and the Alabama Court of Criminal Appeals addressed, and rejected, the claim because there was insufficient evidence to support it. *Williams,* 782 So. 2d at 833. The facts underlying the claim are also the basis for one of petitioner's ineffective assistance of counsel claims.

state court's factual finding that the statement was not induced by state action, and petitioner has failed to demonstrate why the findings on this issue are unreasonable in light of the evidence presented at the Rule 32 hearing.[33]

Claim F: Denial of Youthful Offender Status

Petitioner contends that he was denied his constitutional right to due process of law under the Eighth and Fourteenth Amendments because the trial court failed to conduct a sufficient investigation and examination before denying his request for youthful offender status. This claim was raised on petition for certiorari to the Alabama Supreme Court. By affirming the conviction, that court implicitly rejected the youthful offender claim although the claim itself was not specifically addressed. Even this "unexplicated rejection of [petitioner's] federal claim qualifies as an adjudication entitled to deference under § 2254(d)." *Herring v. Secretary Dept. of Corrections*, 397 F.3d 1338, 1347 (11th Cir. 2005).

The state court's denial of the youthful offender/due process claim was not an unreasonable application of clearly established law. Petitioner cites *Hicks v. Oklahoma*, 447 U.S. 343 (1980), for the proposition that "the arbitrary denial of an important state-created right violate[s] due process." (Petr.'s Merits Brf., Doc. 45, at 192.) In this case, however, the state- created "rights" allegedly denied never existed in the first place. "The granting or denial of youthful offender treatment is analogous to that of sentencing where

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[33] The Rule 32 court's rejection of the underlying facts is discussed *infra*, pp. 37-39.

courts have wide discretion even though there are few or no statutory guidelines for the exercise of such discretion. Once it is determined that the judge has exercised his discretion within statutory limits, appellate review is at an end." *United States ex rel. Frasier v. Casscles,* 531 F.2d 645, 647 (2nd Cir. 1976) (per curiam). Like the New York statute in *Casscles,* the Alabama Youthful Offender Act commits the decision on youthful offender status to the complete discretion of the trial judge. Ala. Code § 15- 19- 1 (1975).[34] The statute provides that the defendant "may be investigated and examined by the court to determine whether he should be tried as a youthful offender" but contains no requirement for any specific type of investigation or examination, nor does it require that

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[34] In its entirety, § 15-1 9-1 states:

(a) A person charged with a crime which was committed in his minority but was not disposed of in juvenile court and which involves moral turpitude or is subject to a sentence of commitment for one year or more shall, and, if charged with a lesser crime may be investigated and examined by the court to determine whether he should be tried as a youthful offender, provided he consents to such examination and to trial without a jury where trial by jury would otherwise be available to him. If the defendant consents and the court so decides, no further action shall be taken on the indictment or information unless otherwise ordered by the court as provided in subsection (b) of this section.

(b) After such investigation and examination, the court, in its discretion, may direct that the defendant be arraigned as a youthful offender, and no further action shall be taken on the indictment or information; or the court may decide that the defendant shall not be arraigned as a youthful offender, whereupon the indictment or information shall be deemed filed.

the defendant be afforded an opportunity to present evidence or to challenge the investigation. *Id.*

CONCLUSION

Petitioner is not entitled to relief on any of the claims that have proceeded to review on the merits. Because all of the claims presented in this matter have been found to be either moot, procedurally defaulted or without merit, it is hereby ORDERED that the petition for habeas relief be and hereby is DENIED.

DONE and ORDERED this the 30th day of October, 2006.

s/ Charles R. Butler, Jr.
SENIOR UNITED STATES DISTRICT JUDGE

Court of Criminal Appeals of Alabama

HERBERT WILLIAMS, Jr.

v.

STATE

CR-98-1074

Feb. 4, 2000

Rehearing Denied March 17, 2000

Certiorari Denied Nov. 9, 2000 Ala Sup Court 1991200

BASCHAB, Judge

On February 16, 1990, the appellant, Herbert Williams, Jr., was convicted of capital murder for killing Timothy Hasser during the course of a robbery. *See* § 13A-5-40(a)(2), Ala.Code 1975. By a vote of 9-3, the jury recommended that he be sentenced to imprisonment for life without the possibility of parole. However, the trial court overrode the jury's recommendation and sentenced the appellant to death by electrocution. This court and the Alabama Supreme Court affirmed his conviction and sentence, *see Williams v. State*, 627 So.2d 985 (Ala.Cr.App.1991), aff'd, 627 So.2d 999 (Ala.1993), and the United States Supreme Court denied the appellant's petition for certiorari review, *see Williams v. Alabama*, 511 U.S. 1012, 114 S.Ct. 1387, 128 L.Ed.2d 61 (1994). The relevant facts of the case are set forth in those opinions. This court issued a certificate of judgment on September 14, 1993.

On October 17, 1994, the appellant, through counsel, filed a Rule 32, Ala. R. Crim. P., petition for post-conviction relief, which he amended twice. The State responded, arguing that the issues the appellant

raised either lacked merit or were precluded. After conducting an evidentiary hearing, the circuit court denied the petition. This appeal follows.

The appellant raises numerous issues on appeal, including substantive claims alleging errors at trial and claims that his attorneys rendered ineffective assistance at trial and on appeal. In reviewing the circuit court's denial of the appellant's petition, we apply the following principles.

> " ' "[T]he plain error rule does not apply to Rule 32 proceedings, even if the case involves the death sentence." *Thompson v. State,* 615 So.2d 129 (Ala.Cr.App.1992).' *Cade v. State,* 629 So.2d 38, 41 (Ala.Cr.App.1993), cert. denied, 511 U.S. 1046, 114 S. Ct. 1579, 128 L.Ed.2d 221 (1994).
>
> "In addition, '[t]he procedural bars of Rule 32 apply with equal force to all cases, including those in which the death penalty has been imposed.' *State v. Tarver,* 629 So.2d 14, 19 (Ala.Cr.App.1993)."

Brownlee v. State, 666 So.2d 91, 93 (Ala.Cr.App.1995).

> "To prevail on a claim of ineffective assistance of counsel, the defendant must show (1) that his counsel's performance was deficient and (2) that he was prejudiced as a result of the deficient performance. *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).
>
> " 'The appellant must show that his counsel's performance was unreasonable, considering all of the attendant circumstances.... "[A] court deciding an actual ineffectiveness claim must judge the

reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Strickland,* 466 U.S. at 690, 104 S.Ct. at 2066.'

" *Duren v. State,* 590 So.2d 360, 362 (Ala.Cr.App.1990), aff'd, 590 So.2d 369 (Ala.1991), cert. denied, 503 U.S. 974, 112 S.Ct. 1594, 118 L.Ed.2d 310 (1992).

"When this court is reviewing a claim of ineffective assistance of counsel, we indulge a strong presumption that counsel's conduct was appropriate and reasonable. *817 *Luke v. State,* 484 So.2d 531, 534 (Ala.Cr.App. 1985). The burden is on the appellant to show that his counsel's conduct was deficient. *Luke.*

" 'Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the

challenged action "might be considered sound trial strategy." There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.'

" *Strickland,* 466 U.S. at 689, 104 S.Ct. at 2065-66. (Citations omitted.) *Ex parte Lawley,* 512 So.2d 1370, 1372 (Ala.1987).

"Initially we must determine whether counsel's performance was deficient. We must evaluate whether the action or inaction of counsel of which the petitioner complains was a strategic choice. 'Strategic choices made after a thorough investigation of relevant law and facts are virtually unchallengeable....' *Lawley,* 512 So.2d at 1372. This court must avoid using 'hindsight' to evaluate the performance of counsel. We must evaluate all the circumstances surrounding the case at the time of counsel's actions before determining whether counsel rendered ineffective assistance. *Falkner v. State,* 586 So.2d 39 (Ala.Cr.App.1991)."

Hallford v. State, 629 So.2d 6, 8-9 (Ala.Cr.App.1992), cert. denied, 511 U.S. 1100, 114 S.Ct. 1870, 128 L.Ed.2d 491 (1994).

"In determining whether a defendant has established his burden of showing that his counsel was ineffective, we are not required to address both considerations of the *Strickland v. Washington* test if the defendant makes an insufficient showing on one of the prongs. *Id.* at 697, 104 S.Ct. at 2069. In fact, the Court explained that '[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so,

that course should be followed.' *Id.* We defer to this guidance and address the 'prejudice' prong, for '[w]ith respect to the prejudice component, the lack of merit of [Thomas's] claim is even more stark.' *Id.* at 699, 104 S.Ct. at 2070."

Thomas v. State, 511 So.2d 248, 255 (Ala.Cr.App.1987) (footnote omitted).

"Furthermore, to render effective assistance, an attorney is not required to raise every conceivable constitutional claim available at trial and on appeal. *Holladay v. State,* 629 So.2d 673 (Ala.Cr.App.1992), cert. denied, 510 U.S. 1171, 114 S.Ct. 1208, 127 L.Ed.2d 555 (1994); *McCoy v. Lynaugh,* 874 F.2d 954, 965-66 (5th Cir.1989). Rather, counsel must be given some discretion in determining which claims possibly have merit, and thus a better chance of success, and which claims do not have merit, and thus have little chance of success. *Heath v. State,* 536 So.2d 142 (Ala.Cr. App.1988); ***818** *Smith v. Murray,* 477 U.S. 527, 106 S.Ct. 2661, 91 L.Ed.2d 434 (1986); *Engle v. Isaac,* 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982)."

Davis v. State, 720 So.2d 1006, 1014 (Ala.Cr.App.1998), cert. denied, 525 U.S. 1149, 119 S.Ct. 1049, 143 L.Ed.2d 55 (1999).

In its order denying the appellant's petition, the circuit court stated the following with regard to the appellant's ineffective assistance of counsel claims:

"Having read and heard the many assertions of ineffective assistance of counsel, the court is convinced they are at best second-guessing, and allegations of ineffective counsel without proof fall

woefully short of ineffective assistance of counsel. Most, if not all, of the assertions of ineffective assistance can be traced to trial tactic the petitioner, using hindsight, now says is error.

"....

"There are many routes from Mobile to Montgomery and they will all get you there. People will differ or argue over which route is the best. Likewise, there are many different ways to handle the trial of any case in court. Therefore, to simply second-guess what another attorney has or has not done falls woefully short of being ineffective assistance of counsel....

"....

"... In this case, the evidence at trial was overwhelming against the defendant-petitioner herein. Therefore, applying the *Strickland* standard to all of Williams' claims of ineffective assistance of counsel shows that he received effective assistance of counsel.

"....

"Petitioner has failed to prove that his trial or appellate counsel were ineffective. The trial transcript, which the court is very familiar with, and the evidence presented at the Rule 32 hearing, establishes that the Petitioner was represented by very capable attorneys from arraignment to date. That is, the petitioner received very effective representation he was guaranteed by the Constitution. The petitioner was convicted and sentenced to death because of the weight of the evidence against him."

(C.R.648-53, 690.)

I.

The appellant's first argument is that the State withheld exculpatory information in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Specifically, he contends that the State suppressed evidence that a potential witness had seen the appellant and the victim together in Mobile before the murder and evidence that a white Porsche automobile had been seen at the scene of the crime at about 3:30 p.m. on the day of the murder. The appellant did not assert that this claim was based on newly discovered evidence. Therefore, it is procedurally barred because he could have raised it at trial and on direct appeal, but did not. *See* Rule 32.2(a)(3) and (a)(5), Ala. R.Crim. P.; *Boyd v. State*, 746 So.2d 364 (Ala.Cr.App.1999); *Matthews v. State*, 654 So.2d 66 (Ala.Cr.App.1994); *Lundy v. State*, 568 So.2d 399 (Ala.Cr.App.1990).

Furthermore, the appellant's claim is without merit. In rejecting this claim, the circuit court found as follows:

> "Williams contends that the State failed to disclose information that was potentially exculpatory and that could have been used to impeach key prosecution witnesses. See Claim J of the second amended petition. Williams argues that the State's failure to produce this information violated *Brady v. Maryland*, 373 U.S. 83[, 83 S.Ct. 1194, 10 L.Ed.2d 215] (1963). In *Brady*, the prosecutor had withheld evidence, a statement by ***819** Brady's co-defendant, which was directly relevant to the extent that Brady was involved in the crime. The Court held that 'the

suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith of the prosecution.' 373 U.S. at 87[, 83 S.Ct. 1194]. Williams introduced three exhibits into evidence at the evidentiary hearing which he contends were in the prosecutor's file and were suppressed. Williams argues the suppression of these handwritten notes contained in the prosecutor's file violated his rights to due process and a fair trial.

"A *Brady* violation has three elements: (1) suppression by the prosecution (2) of exculpatory evidence (3) material to the issues at trial or sentencing. *Nelson v. Nagle,* 995 F.2d 1549, 1555 (11th Cir.1993). The third element is satisfied 'only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome.' *United States v. Bagley,* 473 U.S. 667, 682[, 105 S.Ct. 3375, 87 L.Ed.2d 481] (1985).

"Williams offered three handwritten notes that were contained in the file of the Alabama Bureau of Investigation or the file of the District Attorney. Petitioner's Exhibit 3A is a handwritten note that was contained in the file of the Alabama Bureau of Investigation. That handwritten notes states in relevant part:

" 'John Nixon

" '5270 Old Highway 43

" 'Satsuma, AL 679-0055

" 'Saw a White Porsche at the Creola Truck repair

" 'Wed Nov 2, 1988

" '3:25 to 3:30 pm'

"See Petitioner's Exhibit 3A. There is another note in the handwriting of Chris Galanos, the prosecutor that tried this case, that merely references the information contained in Petitioner's Exhibit 3A. That note states in relevant part: 'Chief Hammond-*John Nixon* [emphasis in note] saw car pull in interstate trucking 3:25 to 330.' See Petitioner's Exhibit 5. The other handwritten note that Williams presented was also in the handwriting of Chris Galanos, and it states in relevant part:

> " 'Palmer Williams advised by telephone that Luther & Ramsey "discovered" scene between (unreadable word) & Creole-also advises that Jerry Parker, 1101 Government Street, may have seen V (presumably "V" means victim) and [a triangle] [presumably this symbol stands for the word "defendant"] @ corner of Roper and [an unreadable word but presumably the name of a street][.]'

"See Petitioner's Exhibit 4.

"The first element of a *Brady* claim is whether these handwritten notes were suppressed from Williams' trial counsel. Both trial counsel that testified at the Rule 32 evidentiary hearing stated that they had not seen these handwritten notes. However, one of the trial counsel acknowledged that this court had ordered an open file discovery policy. Trial counsel added that he was 'not allowed to go to Mr. Galanos'

office and go through his file.' Rule 32 transcript at 45. The record of the trial transcript shows that neither trial counsel filed a motion indicating that the prosecutor was in violation of this court's order, see RI at 62, which ordered the prosecutor to have an open file. Therefore, Williams has not established by a preponderance*820 of the evidence that these handwritten notes were suppressed.

"Williams failed to prove the second element of a *Brady* claim that the suppressed evidence was favorable to the defendant or exculpatory. There is clearly nothing in any of the three handwritten notes that is exculpatory to Williams. This court will analyze whether the notes contain information that would have been favorable to Williams. Both trial counsel testified at the Rule 32 evidentiary hearing that the information contained in the notes could have supported the defense's theory that Timothy Hasser and Herbert Williams knew each other and were involved together in the sale of drugs. Petitioner's Exhibit 4, a note in the handwriting of the prosecutor that tried this case, does contain a reference that an individual named Jerry Parker *may* have seen the victim and the defendant at the intersection of two streets. This handwritten note is not favorable to Williams for several reasons. The handwritten note only indicates that an individual named Jerry Parker may have seen the victim with Williams, not that the two were definitely seen together. Chris Galanos, the author of Petitioner's Exhibit 4, was not called as a witness at the Rule 32 evidentiary hearing, so the origin of the information contained in the note is unknown. It is very possible that this note contains triple or quadruple hearsay.

Additionally, regarding Petitioner's Exhibit 4, Williams has not established that any admissible evidence or evidence which may lead to admissible evidence could have been presented. Petitioner's Exhibit 4 can only be admitted in these Rule 32 proceedings for the limited purposes of showing that the note was written by the prosecutor and was contained in his file. Williams did not present any admissible evidence to show that the information contained in this note could have been presented to the jury in some way. Williams also did not present any evidence to show that the police who were investigating this crime had knowledge of any of the information contained in Petitioner's Exhibit 4.

"The information contained in Petitioner's Exhibits 3A and 5[is] not favorable to Williams. The two handwritten notes indicate that an individual named John Nixon saw a white Porsche at the Creola Truck Repair around 3:30 in the afternoon preceding the murder which occurred later that night. Petitioner's Exhibit 5 merely indicates that Chris Galanos knew this information. Williams also called John Nixon as a witness at the Rule 32 evidentiary hearing to testify regarding what he saw. None of the information in Petitioner's Exhibits 3A and 5 or in the testimony of Nixon is favorable to Williams. There is nothing in these notes or in Nixon's testimony that establishes that the white sports car he saw on November 2, 1988, was owned by Timothy Hasser. During his testimony at the Rule 32 evidentiary hearing, Nixon was not sure if the make of the car he saw that day was a Porsche. Rule 32 transcript at 90. Nixon testified that 'I thought it was a Mazda at the time.' Rule 32 transcript at 89. Additionally, there is

nothing in these notes or in Nixon's testimony that links this information with the victim or Williams. Nixon testified that he did not see anybody standing around the car, nor did he see anybody in the car.

"The State presented a witness at the Rule 32 evidentiary hearing that established the whereabouts of Timothy Hasser from 3:10 to 3:50 in the afternoon preceding his murder that night. Carolyn Hasser, who was Timothy Hasser's sister-in-law, testified that Timothy Hasser ***821** picked up her two children around 3:10 that afternoon and took them to a department store. Rule 32 transcript at 390. Mrs. Hasser stated that Tim was driving his white Porsche that afternoon. Rule 32 transcript at 390. Tim returned to Carolyn Hasser's home around 3:40 that afternoon and visited for about ten minutes before returning to work. Rule 32 transcript at 390. Carolyn Hasser's testimony further establishes that the information contained in Petitioner's Exhibits 3A and 5 and the testimony of John Nixon is not favorable to Williams.

"Undisclosed evidence is material 'only if there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different.' *United States v. Bagley*, 473 U.S. 667, 682[, 105 S.Ct. 3375, 87 L.Ed.2d 481] (1985). Williams has not established that any of these handwritten notes are material. In Petitioner's Exhibit 4, there is a reference that an individual may have seen Hasser and Williams together. There was no evidence presented at the Rule 32 evidentiary hearing to establish this fact. If Williams is arguing that he could have presented this handwritten note to the jury as substantive evidence, then the court flatly

> rejects such an argument. Williams has presented no evidence to undermine confidence that he received a fair trial. Williams' claim based upon *Brady v. Maryland* lacks merit."

(C.R.684-90.) After reviewing the trial transcript and the three notes, we agree with the circuit court's findings and adopt them as part of this opinion. Furthermore, even if we assume that the appellant proved that the State suppressed the notes, he has not established that the notes were material or exculpatory. Accordingly, the appellant is not entitled to relief on this claim.

II.

The appellant's second argument is that his trial attorneys rendered ineffective assistance because they allegedly did not investigate, prepare, and present critical mitigation testimony to the jury and the trial court. First, he contends that his trial attorneys rendered ineffective assistance because they did not discover mitigating evidence. Specifically, he contends that they should have called his half sister as a witness to testify about the sexual, physical, and psychological violence perpetrated by his father. He further contends that other family members, teachers, and friends could have corroborated this testimony and provided additional information about his upbringing.[1] Second,

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[1] In a footnote, the appellant contends that the circuit court erred in not admitting an affidavit from his grandmother, Evelyn Eaton, into evidence during the Rule 32 proceedings. However, we have reviewed the affidavit and conclude that it would not have made a difference in the outcome of this case. Therefore, error, if any, in the circuit court's refusal to admit

the appellant contends that his trial attorneys rendered ineffective assistance because they did not hire a psychiatric or psychological expert to present mitigation evidence to the jury and the trial court. Specifically, he contends that such an expert could have testified about the "permanent psychological damage [he suffered] as a result of his violent, neglectful upbringing" and "[linked his] psychiatric problems to his behavior in the crime with which he was charged." (Appellant's brief at pp. 35, 41.)

In reviewing this claim, we are guided by the following principles. In *Daniels v. State,* 650 So.2d 544, 568-70 (Ala.Cr.App.1994), cert. denied, 514 U.S. 1024, 115 S.Ct. 1375, 131 L.Ed.2d 230 (1995), we stated the following regarding a ***822** claim that trial counsel had rendered ineffective assistance during the penalty phase of a capital murder trial:

> "In determining whether Haas was ineffective at original sentencing, ... we recognize that the
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> " 'two-pronged *Strickland* analysis applies whether the ineffectiveness complained of occurred in the defendant's trial or in a subsequent adversarial sentencing proceeding. However, in a challenge to the imposition of a death sentence, the prejudice prong of the *Strickland* inquiry focuses on whether "the sentencer ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." '
>
> " *Stevens v. Zant*, 968 F.2d 1076, 1081 (11th Cir.1992) (citation omitted), cert. denied, 507 U.S. 929, 113

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the affidavit into evidence was harmless. *See* Rule 45, Ala. R. App. P.

S.Ct. 1306, 122 L.Ed.2d 695 (1993). We also recognize that

> " '[w]hile "[i]t should be beyond cavil that an attorney who fails altogether to make any preparations for the penalty phase of a capital murder trial deprives his client of reasonably effective assistance of counsel by any objective standard of reasonableness,"*see Blake v. Kemp*, 758 F.2d 523, 533 (11th Cir.1985), it is unclear how detailed an investigation is necessary to provide a defendant with the effective assistance of counsel. *Strickland* only requires that counsel's actions fall within the wide spectrum of what can be considered reasonable assistance of counsel.'

" *White v. Singletary*, 972 F.2d 1218, 1224 (11th Cir.1992). The principles regarding an attorney's duty to conduct an investigation into mitigating evidence have been summarized as follows:

> " 'An attorney has a duty to conduct a reasonable investigation, including an investigation of the defendant's background, for possible mitigating evidence. *Thompson v. Wainwright*, 787 F.2d 1447, 1451 (11th Cir.1986). First, it must be determined whether a reasonable investigation should have uncovered such mitigating evidence. If so, then a determination must be made whether the failure to put this evidence before the jury was a tactical choice by trial counsel. If so, such a choice must be given a strong presumption of correctness, and the inquiry is generally at an end. *Funchess v. Wainwright*, 772 F.2d 683, 689-90 (11th Cir.1985). If, however, the failure to present the mitigating evidence was an oversight, and not a tactical

decision, then a harmlessness review must be made to determine if there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Thus, it must be determined that defendant suffered actual prejudice due to the ineffectiveness of his trial counsel before relief will be granted.'

" *Middleton v. Dugger,* 849 F.2d 491, 493 (11th Cir.1988).

"Applying the foregoing principles to the issue of whether Haas provided effective assistance of counsel at original sentencing, we conclude that the appellant's claim is without merit. Although the defense called only one witness at the sentencing hearing, that witness was Mrs. Hebert, the appellant's mother, who pleaded for the appellant's life. Mrs. Hebert had retained Haas, conferred with him at length, paid all his trial fees, and, by the time of sentencing, had exhausted her funds. The circuit court's sentencing order stated that 'it is apparent to the court that [Mrs. Hebert] was devoted to [the appellant].'

***823** "Since Haas had spoken with Mrs. Hebert about the appellant and had observed by her words and actions that she appeared to be 'devoted' to the appellant, we cannot fault Haas for failing to discover the appellant's 'traumatic' childhood, in which, according to later testimony by Dr. Herlihy, Mrs. Hebert's 'emotional rejection' of her son played a large part. Compare *Bertolotti v. Dugger,* 883 F.2d 1503, 1520 (11th Cir.1989) (defense counsel held to have provided effective assistance on claim that counsel overlooked or failed to investigate evidence of

defendant's traumatic childhood, where counsel interviewed defendant's parents), cert. denied, 497 U.S. 1032, 110 S.Ct. 3296, 111 L.Ed.2d 804 (1990). See also *Beets v. Collins*, 986 F.2d 1478, 1488-89 (5th Cir.1993) (although counsel did not 'conduct a thorough investigation of [the defendant's] medical, mental, and psychological history,' which would have revealed that the defendant 'was raised in abject poverty, experienced a debilitating hearing loss, was afflicted with learning disabilities, had received head injuries as a child, and suffers from battered woman syndrome,' the court observed that the defendant never gave her attorney 'any hint that she had been abused by previous husbands or boyfriends. Neither [the defendant] nor any other member of her family ever conveyed to [the attorney] any information giving him reason to believe that she had a history of being physically abused.'), rehearing granted, 998 F.2d 253 (5th Cir.1993); *Cantu v. Collins*, 967 F.2d 1006, 1016 (5th Cir.1992) (despite fact that counsel failed to present evidence of defendant's 'low IQ, emotional immaturity, troubled youth, trauma as a result of his parents' divorce, and appearance of neglect,' court found that counsel had 'thoroughly investigated these claims, consulting with his client as well as [client's] father and brother for possible mitigating evidence,' and the claims were not supported in fact), cert. denied, [509] U.S. [926], 113 S.Ct. 3045, 125 L.Ed.2d 730 (1993); *Wilkerson v. Collins*, 950 F.2d 1054, 1064-65 (5th Cir.1992) (although attorney failed to discover or develop mitigating evidence that defendant had a 'deprived family background,' and psychological and mental 'limitations,' the court observed that 'trial counsel interviewed [the defendant], his mother, and other

relatives. Neither [the defendant] nor his relatives were able to supply the names of potential defense witnesses. Investigation did not reveal reason to suspect that [the defendant's] mental capacity was in any fashion impaired.'), cert. denied, [509] U.S. [921], 113 S.Ct. 3035, 125 L.Ed.2d 722 (1993); *Thompson v. State*, 581 So.2d 1216, 1238 (Ala.Cr.App.1991) (upholding circuit court's finding that counsel, who presented only the testimony of defendant's mother at sentencing, was not ineffective for failing to present evidence of the defendant's violent family background, addiction and substance abuse), cert. denied, 502 U.S. 1030, 112 S.Ct. 868, 116 L.Ed.2d 774 (1992).

"We hold that Haas was not ineffective at the original sentencing proceeding."

650 So.2d at 568-70 (emphasis omitted). Also, counsel does not necessarily render ineffective assistance simply because he does not present all possible mitigating evidence. "Although the failure to conduct a reasonable investigation of possible mitigating evidence may constitute ineffective assistance of counsel, 'counsel may make a reasonable strategic judgment to present less than all possible available evidence in mitigation.' *Stanley v. Zant*, 697 F.2d 955, 965 (11th Cir.1983), ***824** 467 U.S. 1219, 104 S.Ct. 2667, 81 L.Ed.2d 372 (1984)." *Lundy v. State*, 568 So.2d 399, 403 (Ala.Cr.App.1990).

"When a decision to not put on certain mitigating evidence is based on a 'strategic choice,' courts have always found no ineffective performance. *Moore v. Maggio*, 740 F.2d 308 (5th Cir.1984), cert. denied, 472 U.S. 1032, 105 S.Ct. 3514, 87 L.Ed.2d 643 (1985);

Lowenfield v. Phelps, 817 F.2d 285 (5th Cir.1987), aff'd, 484 U.S. 231, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988). No two lawyers would try a case exactly the same way.

"We cannot say that counsel's performance is deficient because he failed to call more witnesses at the sentencing phase. 'The decision not to call a particular witness is usually a tactical decision not constituting ineffective assistance of counsel.' *Oliver v. State*, 435 So.2d 207, 208 (Ala.Cr.App.1983). At the hearing on the Rule 32 petition, the appellant's mother, two of his aunts, an uncle, and several old friends offered character testimony. Most of these witnesses did not have contact with the appellant near the time of the murder. There has never been a case where additional witnesses could not have been called. The appellant presented relatives and personal friends who, upon interview, were found to testify on his behalf. We refuse to set a standard that a court may be reversed because it did not hear unoffered testimony from still more friends and relatives. We also refuse to say that a member of the bar is guilty of ineffectiveness for not calling every witness and friend who was willing to testify. To hold otherwise would clog an already overburdened system with repetitious testimony. The appellant has failed to satisfy either prong of the *Strickland* test."

State v. Tarver, 629 So.2d 14, 21 (Ala.Cr.App.1993), cert. denied, 511 U.S. 1078, 114 S.Ct. 1664, 128 L.Ed.2d 380 (1994).

"With regard to McKinnon's representation of Morrison at the punishment-fixing and sentencing phases of his trial, we find that the observations of

the court in *Clark v. Dugger,* 834 F.2d 1561, 1568 (11th Cir.1987), are appropriate:

> " 'The failure to conduct a reasonable investigation of possible mitigating evidence may render counsel's assistance ineffective. *Lightbourne v. Dugger,* 829 F.2d 1012, 1025 (11th Cir.1987); *Thompson v. Wainwright,* 787 F.2d 1447, 1450 (11th Cir.1986), cert. denied, 481 U.S. 1042, 107 S.Ct. 1986, 95 L.Ed.2d 825 (1987). "After a sufficient investigation, however, 'counsel may make a reasonable strategic judgment to present less than all possible available evidence in mitigation.' " *Lightbourne,* 829 F.2d at 1025 (quoting *Mitchell v. Kemp,* 762 F.2d 886, 889 (11th Cir.1985), cert. denied, 483 U.S. 1026, 107 S.Ct. 3248, 97 L.Ed.2d 774 (1987) and *Stanley v. Zant,* 697 F.2d 955, 965 (11th Cir.1983), cert. denied, sub nom. [*Stanley v. Kemp,*] 467 U.S. 1219, 104 S.Ct. 2667, 81 L.Ed.2d 372 (1984)). In essence, "[c]ounsel has no absolute duty to present mitigating character evidence." *Id.* (quoting *Mitchell,* 762 F.2d at 889). [Counsel] conducted a reasonable investigation to determine the availability of appropriate mitigating evidence and simply made a tactical decision to not present some of the available mitigating evidence. In this circuit, [counsel's] decision is "accorded a strong presumption of correctness which is 'virtually unchallengeable.' " *Id.* (quoting *Sinclair v. Wainwright,* 814 F.2d 1516, 1519 (11th Cir.1987) and ***825** *Strickland v. Washington,* 466 U.S. 668, 690, 104 S.Ct. 2052, 2066, 80 L.Ed.2d 674 (1984)). Given the alternatives ... faced, [counsel's] handling of the penalty phase was not unreasonable. *See Stanley,* 697 F.2d at

> 958-70. We therefore conclude that there has been no showing of ineffective assistance nor prejudice to defendant in the way trial counsel prepared and tried [this] case.' "

Morrison v. State, 551 So.2d 435, 445 (Ala.Cr.App.1989), cert. denied, 495 U.S. 911, 110 S.Ct. 1938, 109 L.Ed.2d 301 (1990).

> "We find that the holding of *Fleming v. Kemp,* 748 F.2d 1435, 1452 (11th Cir.1984), cert. denied, 475 U.S. 1058, 106 S.Ct. 1286, 89 L.Ed.2d 593 (1986), is applicable here:
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> > " 'In summary, we are not persuaded by petitioner's argument that ... [defense counsel] rendered him ineffective assistance of counsel. Petitioner's examples of professional dereliction dissolve away under close scrutiny, leaving at best a handful of colorable claims. A defense attorney is not ineffective solely because his client is sentenced to death. "Intrusive post-trial inquiry into attorney performance," such as that which has been required in this case, may "dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client." *Strickland v. Washington,* [466] U.S. at [690], 104 S.Ct. at 2066. Counsel's performance, here, ensured a fundamentally "fair trial" which "produced a just result." *Id.* at [686], 104 S.Ct. at 2064. There is no reason to set aside petitioner's conviction or his penalty on account of the representation he received.' "

Bell v. State, 518 So.2d 840, 847 (Ala.Cr.App.1987), cert. denied, 486 U.S. 1036, 108 S.Ct. 2024, 100

L.Ed.2d 611 (1988). Finally, the appellant bears a heavy burden of proof when he claims that his counsel rendered ineffective assistance.

> "Further, we cannot say that the appellant suffered any prejudice based on counsel's performance because he failed to demonstrate any evidence of mitigation. Prejudice cannot merely be alleged; it must be affirmatively proved. *Duren v. State,* 590 So.2d 360 (Ala.Crim.App.1990). Thus, the appellant has not shown that there is a reasonable probability that the outcome of his trial would have been different, but for trial counsel's performance. *Baldwin [v. State,* 539 So.2d 1103 (Ala.Crim.App.1988)*], Thompson v. State,* 581 So.2d 1216 (Ala.Crim.App.1991), cert. denied, 502 U.S. 1030, 112 S.Ct. 868, 116 L.Ed.2d 774 (1992)."

Brooks v. State, 695 So.2d 176, 182 (Ala.Cr.App.1996), aff'd, 695 So.2d 184 (Ala.), cert. denied, 522 U.S. 893, 118 S.Ct. 233, 139 L.Ed.2d 164 (1997).

The circuit court addressed the appellant's claims in this regard as follows:

> "Williams contends that trial counsel failed to provide him with effective assistance of counsel at the penalty phase of the trial because they failed to adequately investigate and present the evidence that Williams presented at the Rule 32 evidentiary hearing. See paragraphs 16(s)-(z) of the second amended petition. In particular, Williams alleges that trial counsel did not conduct a reasonable investigation into his background and did not obtain an independent mental health expert.
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> "Williams' argument lacks merit because the

evidence shows that trial counsel consulted with a mental health expert named Dr. Van Rosen and was not ***826** able to use his testimony because it was not favorable to Williams. Additionally, trial counsel investigated Williams' background and presented evidence about the abuse he suffered at the hands of his father. At the penalty phase of the trial, trial counsel argued the presence of two statutory mitigating circumstances. Trial counsel argued that Williams did not have any history of prior criminal activity, Ala.Code § 13A-5-51(1) (1975), and that Williams was 19 years of age at the time of the crime, Ala.Code § 13A-5-51(7) (1975). Based upon the argument of trial counsel, this court found the existence of both of these mitigating circumstances. See RI at 113-14. Trial counsel presented the testimony of Arcola Williams, Williams' mother, who testified that Williams was beaten by his father many times. RII at 277. Mrs. Williams also testified that she was beaten by Herbert Williams, Sr., in the presence of Williams. RII at 279. Mrs. Williams testified that Herbert Williams, Sr., had recently been charged with the rape of their 14-year-old mentally retarded daughter. RII at 280. In the sentencing order, this court found as a non-statutory mitigating circumstance that Herbert Williams, Sr., was violent and abusive towards Williams. RI at 114. Trial counsel's penalty-phase strategy was successful since the jury returned an advisory verdict of life without parole. See RI at 115.

"In examining whether a defendant in a death penalty case was prejudiced by the failure to present mitigating evidence, 'the question is whether there is a reasonable probability that, absent the errors, the

sentencer ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.' *Strickland,* 466 U.S. at 695[, 104 S.Ct. 2052]. 'It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding.' *Id.* at 693[, 104 S.Ct. 2052].

"At the Rule 32 evidentiary hearing, Williams called witnesses in an attempt to show that mitigating evidence regarding physical abuse and neglect was not presented to the jury. Williams contends that trial counsel was constitutionally ineffective for not presenting testimony such as was presented at the Rule 32 evidentiary hearing. This testimony was presented to show that Williams was physically abused by his father as were other members of his family. The Alabama Court of Criminal Appeals has addressed and rejected this type of argument: 'There has never been a case where additional witnesses could not have been called. The appellant presented relatives and personal friends who, upon interview, were found to testify on his behalf. We refuse to set a standard that a court may be reversed because it did not hear unoffered testimony from still more friends and relatives. We also refuse to say that a member of the bar is guilty of ineffectiveness for not calling every witness and friend who was willing to testify.' *State v. Tarver,* 629 So.2d 14, 21 (Ala.Cr.App.1993).

"In addition, the evidence regarding Williams' background was never found to have a causal relationship with Williams committing capital murder. In the sentencing order, this court found that Williams 'purposely and deliberately planned to enter the home of the victim, Timothy C. Hasser, await his

arrival, and steal his automobile, a model 928 Porsche.' RI at 107. This court further stated in the sentencing order that 'the events which led to the murder of Timothy Hasser were not the product *827 of chance; rather, these events were planned and executed with military-like precision.' RI at 108. At trial, there was evidence presented that Williams was obsessed with the automobile owned by Timothy Hasser. Williams carried out his plan to take Hasser's Porsche by abducting the victim at gunpoint and killing him at a remote site and attempting to dispose of the body by throwing it into a river. Any additional testimony offered by Williams at the Rule 32 evidentiary hearing that he was physically abused by his father has little mitigation value due to the fact that this was a deliberately planned crime where the victim was murdered because Williams wanted his car.

"Williams also contends that trial counsel was constitutionally ineffective for not presenting testimony from a mental health expert at the penalty phase. In making this claim, Williams ignores the fact that, before trial, trial counsel had Williams psychologically evaluated by Dr. Van Rosen, a psychologist. At the Rule 32 evidentiary hearing, James Lackey, one of Williams' trial counsel, testified that Dr. Van Rosen's testimony would not have been helpful:

" 'Q: Does this recall your-do you recall now, reading this, why you didn't use Dr. Van Rosen? Why he was never used by the defense?

" 'A: Yes.

" 'Q: What reason was that?

" 'A: Well, basically his report indicated that there were no-that other than some borderline problems in intelligence and so on, that there was nothing basically wrong with Mr. Williams and that the testing was-felt was somewhat skewed by a lack of effort or attempt to confuse the tester by Mr. Williams.

" 'Q: Okay. Just briefly can you tell us-

" 'A: I didn't think his testimony would be very helpful.

" 'Q: Did you consider using him, his testimony at the penalty phase?

" 'A: No.

" 'Q: For the same reason?

" 'A: For the same reason.'

"Rule 32 transcript at 53. Trial counsel's testimony shows that Williams was evaluated by a psychologist but that the psychologist did not give trial counsel any helpful evidence to use at the penalty phase. Dr. Karl Kirkland, who was under contract with the State to testify at the Rule 32 evidentiary hearing, commented on Dr. Van Rosen's reputation as a psychologist: '... the attorneys involved in this case at that time had access to who I consider to be the best forensic psychologist in South Alabama at that time, Van Rosen, and that they chose not to use his evaluation in this case. And I could understand why they didn't choose to use it.' Rule 32 transcript at 368. This court finds that trial counsel's investigation into presenting expert mental health testimony at the penalty phase was not deficient and was not

unreasonable.

"At the Rule 32 evidentiary hearing, Williams presented the testimony of a psychiatrist from Massachusetts named Dr. Eliott Gelwan. Dr. Gelwan testified that due to the years of chronic abuse Williams had chronic post-traumatic stress disorder. Rule 32 transcript at 271. Dr. Gelwan admitted that, out of the various mental health experts who had evaluated Williams, he was the only one to come up with this type of a diagnosis. Rule 32 transcript at 424. Dr. Kirkland testified at the Rule 32 evidentiary hearing that he disagreed with the diagnosis of ***828** post-traumatic stress disorder because Williams does not meet the criteria contained in the Diagnostic and Statistical Manual of Mental Disorders. Rule 32 transcript at 380. Dr. Van Rosen and Dr. Harry McLaren, who both evaluated Williams soon after the crime, agreed that Williams had an adjustment disorder with depressed features associated with his pending capital murder charges. Rule 32 transcript at 368. The psychologist who evaluated Williams while he was at the Job Corps soon before the crime occurred reported that Williams was depressed. Rule 32 transcript at 425.

"Williams never made a showing that Dr. Gelwan was a witness who would have been available to trial counsel at a capital murder trial in Mobile, Alabama in 1990. Dr. Gelwan testified at the Rule 32 evidentiary hearing that in 1990 he did not know any lawyers in Alabama and at that point in time he had not testified in court on forensic issues as a psychiatrist. Rule 32 transcript at 326. In addition, Dr. Gelwan testified that he put in 75 hours of work on this case and that in 1990 he would have charged

$125 an hour. Rule 32 transcript at 326, 422. With all these facts in mind, this court makes a finding of fact that Williams did not establish that Dr. Gelwan would have been an expert witness available to trial counsel to come and testify in Alabama at a 1990 trial.

"Further, Dr. Gelwan's findings are dubious at best, considering the information that he relied upon. Dr. Gelwan testified at the Rule [32] evidentiary hearing that he believed everything that Williams had communicated to him:

" 'Q: Do you believe everything that Herbert has told you?

" 'A: One of the expertises that a professional examiner has is to be assessing the veracity of his client or his patient, and I believe that he's been honest with me.

" 'Q: All right. So, you believe everything he told you?

" 'A: By and large, yes.'

"Rule 32 transcript at 329-30. Dr. Gelwan testified extensively about Williams' claims that he was friends with Timothy Hasser. Dr. Gelwan believed that Williams 'was taken under wing by Mr. Hasser and developed a relationship with him which was based on some of the strong needs for affiliation and belonging that he (Williams) had that had never been addressed within his own family.' Rule 32 transcript at 297. There was no evidence presented at trial or at these Rule 32 proceedings that supports Williams' claims that he had some kind of relationship with Timothy Hasser that arose because of Williams'

allegations that they dealt drugs together. It is hard to accept the credibility of an expert witness who believes everything that Williams told him when it appears that prior psychologists who have evaluated Williams did not. See Rule 32 transcript at 328 (psychologist from Job Center filed a report stating that Williams' 'reliability as an informant is questionable'); RVII at 1166 (Dr. McLaren's report indicates that Williams was malingering in an effort to exaggerate psychopathology). Before trial, Williams gave four statements all alleging different variations of the theme that Williams and Hasser were engaged in drug dealing together and that Hasser's death was the result of a drug deal gone awry. In one of the statements, Williams claimed that drug dealers, one of whom was named 'Nestor,' conducted a trial and found Timothy Hasser guilty and ordered Williams to execute Hasser, which he did. RVII at 766-67. For Dr. *829 Gelwan to consider everything that Williams told him to be truthful makes the court wonder about his findings.

"Weighing the evidence presented by Williams at the evidentiary hearing against the aggravating circumstances that were proven beyond a reasonable doubt at the penalty phase of the trial shows that trial counsel was not constitutionally ineffective. This court found that the State had proved the following aggravating circumstance: (1) the capital offense was committed while the defendant was engaged in the commission of a robbery. See Ala.Code § 13A-5-49(4) (1975). In finding this aggravating circumstance, this court noted the following:

" 'The evidence, as stated previously, proved beyond a reasonable doubt, that defendant was consumed

with the notion of owning a Porsche and that obsession was the sole motivation for the robbery/murder of Timothy Hasser.

" 'The court, furthermore, attaches great significance to the calculated precision with which this crime was planned and systematically executed. The defendant's diary manifests a greed and depravity of mind characteristic of an individual who has an utter disregard for human life and the rights and property of others.'

"RI at 111-12. In a case such as the present one that involves a carefully planned murder of a brutal nature, along with robbery, the Eleventh Circuit Court of Appeals has found that the aggravating circumstances of the crime outweigh any prejudice caused when a trial counsel fails to present additional mitigating evidence. See, *e.g.*, *Francis v. Dugger*, 908 F.2d 696, 703-04 (11th Cir.1990) (finding that 'evidence of a deprived and abusive childhood [was] entitled to little, if any, mitigating weight,' in a case concerning a deliberately planned torture murder); *Thompson v. Wainwright*, 787 F.2d 1447, 1453 (11th Cir.1986) (holding that 'evidence of a difficult youth, an unsavory defendant, and limited mental capacity would [not] have altered this jury's decision,' in a case involving a rape and brutal torture murder). In light of the gravity of the aggravating circumstance proven beyond a reasonable doubt in this case and the relative non-compelling nature of the mitigating evidence that Williams alleges that trial counsel should have presented, the presentation of this evidence would not have resulted in this court passing down a sentence other than death. There is no reasonable probability that the sentencer would

have concluded that the balance of aggravating and mitigating circumstances did not warrant a death sentence. Therefore, Williams was not prejudiced by trial counsel's failure to present the evidence that was presented at the Rule 32 evidentiary hearing, even if it had been available to him."

(C.R.673-81.) We agree with the circuit court's findings and adopt them as part of this opinion. For these reasons, the appellant is not entitled to relief on this claim.

III.

The appellant's third argument is that his trial attorneys rendered ineffective assistance during the hearing on his motion to suppress a statement he made to law enforcement officers. Specifically, he contends that counsel should have presented the testimony of his mother and/or father to show that the officers violated *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981), by reinitiating questioning after he had invoked his right to counsel; that the officers violated ***830** *Rhode Island v. Innis*, 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980), by using psychological ploys to elicit an incriminating response from him; and that, under the totality of the circumstances, he did not voluntarily give the statement. In rejecting this contention, the circuit court found as follows:

"Williams contends that trial counsel did not provide adequate representation by not calling witnesses 'who could have testified in support of the theory that the police improperly reinitiated the interrogation of Mr. Williams after he had invoked his right to counsel.' See paragraph 16(c) of the

second amended petition. Williams' allegation does not point out that, before Williams had invoked his right to counsel, he had already given two inculpatory statements to the police. Williams gave one of the inculpatory statements to Mark Harrell, a patrol officer with the Jackson Police Department, and the other to Charles Burge, the Assistant Chief of the Jackson Police Department.

"At the Rule 32 evidentiary hearing, Williams presented the testimony of Arcola Williams, his mother, to support this claim. Arcola Williams testified that she, along with Herbert Williams, Sr., went to see Williams the day after he was arrested. Arcola Williams stated that, before she saw her son, the police talked to her. Rule 32 transcript at 203, 232. Arcola Williams testified that:

" 'A: They [the police] both took a side and they was talking with us and they asked us, they said, now he's going to be in a lot of trouble, and they asked us were we prepared to pay for a lawyer. It was going to cost us about-they said 25 or 30 or maybe it could go up to 50 thousand dollars or more. Were we prepared to pay that kind of money for a lawyer. Well, not-

" 'Q: What did they say would happen if you weren't prepared to pay for a lawyer?

" 'A: Well, they told us they could help him if we-if he would talk, but they couldn't get him to talk. So, they encouraged us, they said-encouraged us to get him to talk to-talk to them and tell them what happened, because they couldn't help him if he didn't.

" 'Q: Did they also-what else did they ask you to do, if anything, when you went in to see [Williams]?

" 'A: Well, they told us we could go back there and talk to him, but encourage him to talk to them because they couldn't get nothing out of him, they couldn't get him to talk, and, like I said, they told us that they could help him if he talked-it would be to his best interest or they could help him if he would talk, but if he couldn't talk, there wasn't nothing they could do for him.'

"Rule 32 transcript at 203-04. Williams made no showing regarding whether trial counsel knew any of this information. Mrs. Williams was not asked whether she communicated any of this information to trial counsel. Likewise, neither one of Williams' trial counsel were asked if they knew anything about Mrs. Williams' allegations.

"There are at least two allegations made by Mrs. Williams in her Rule 32 testimony that conflict with the evidence presented at trial. First, the allegation that the police told Mrs. Williams that 'they couldn't get nothing out of [Williams]' is not supported by the facts. At the time that Mrs. Williams saw Williams at the police station he had already given the police two inculpatory statements. Mrs. Williams seems to be asserting that the police needed help in *831 getting Williams to talk when, in fact, he had already given two statements. Second, Mrs. Williams indicates that the police talked to hr and her husband when they entered the police station and before Williams' parents talked to him. Rule 32 transcript at 203, 232. The testimony of Mike Barnett, an investigator with the Alabama Bureau of Investigation who took the

third statement, given at the hearing on the motion to suppress, indicates that Williams' parents talked to Williams before they talked to the police:

" 'They basically wanted to know what-why he was in jail and what happened, some of the circumstances about why he was in jail, and I told them that he was driving a car that had a dead body in it and that the car was registered to the person that was dead and there was some things taken from his residence that led us to believe that he in fact committed a murder, and Mr. Williams said that he had talked to Herbert and that Herbert had told him a-you know, basically his side of the story, which was that he had known Mr. Hasser for a couple of years and that he and Mr. Hasser had had some drug dealings and that the death of Mr. Hasser was the result of a bad drug deal. I told Mr. Williams that, you know, that might be so, I didn't know, but there was other evidence in the investigation that would point in another direction, and he wanted to know if-you know, if I was going to talk to Mr. Williams and I told him, no, that I could not talk to him because he had requested an attorney. I said, the only way that I can talk to him is if he requests, it would have to be his request that one of the police officers come and talk to him, and Mr. and Mrs. Williams went back and talked to Herbert and they came back and said-related to me that he wanted to make a statement. So, I got the police dispatcher or the jailer there to get Herbert out of jail and bring him to Charles Burge's office and we sat down and I talked to Herbert and asked him, you know, his name and everything and advised him of his rights."

"RV at 335-36. In response to this information, Barnett met with Williams; he advised Williams of his *Miranda* rights and ascertained that Williams understood those rights and that, notwithstanding his earlier request for an attorney, he initiated the meeting with Barnett and wanted to speak with him. RV at 338-39. Williams signed a waiver of rights form and wrote on the form a statement to show that he initiated the contact with the police on November 4, 1988. RV at 338-39. The statement that Williams wrote on the waiver of rights is as follows: 'I requested to talk to the police officer today, Nov. 4, 1988. They advised me of my rights and I understand them. HW. 2:18 p.m.' RVIII at 1124.

"The Rule 32 testimony of Mrs. Williams, had it been presented at the hearing on the motion to suppress, would not have changed the outcome of the trial. Therefore, trial counsel cannot be ineffective for not presenting such evidence. Additionally, there has been no evidence presented that trial counsel did not investigate for evidence of this type, or that any of this information was communicated to trial counsel. There has not been sufficient evidence presented to undermine confidence in the fact that Williams reinitiated contact with the police. 'Initiation' is defined as an inquiry that can be 'fairly said to represent a desire on the part of the accused to open up a more generalized ***832** discussion relating directly or indirectly to the investigation.' *Oregon v. Bradshaw*, 462 U.S. 1039, 1045, 103 S.Ct. 2830, 77 L.Ed.2d 405 (1983). Once a defendant initiates contact with the police after invoking his right to counsel, he must knowingly and voluntarily waive his *Miranda* rights or any resulting confession will be

inadmissible. *Edwards v. Arizona,* 451 U.S. 477, 486 n. 9, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981). At the hearing on the motion to suppress, the State established that Williams initiated contact with Barnett, and that he knowingly and voluntarily waived his rights before giving his statement to Barnett. In evaluating all of the evidence presented, there is not sufficient evidence to indicate that there was any State action before Williams reinitiated contact with the police and gave his third statement.

"Williams has not shown that trial counsel's performance was outside 'the wide range of reasonable professional assistance.' *Strickland,* 466 U.S. at 689[, 104 S.Ct. 2052]. There is no reasonable probability that, if trial counsel had presented Mrs. Williams' testimony, the result of the decision on the motion to suppress the third statement would have been different."

(C.R.656-62.) The records of the trial and the Rule 32 proceedings support the circuit court's findings. Accordingly, we adopt these findings as part of this opinion and conclude that the appellant's attorneys did not render ineffective assistance in this regard.

IV.

The appellant's fourth argument is that the State withheld evidence and presented false testimony about the actions of law enforcement officers in obtaining an inculpatory statement from him. He bases his argument on his contention as set forth in Part III of this opinion. However, the circuit court specifically found that "there [was] not sufficient evidence to indicate that there was any State action before Williams reinitiated contact with the police and gave

his third statement." (C.R.661-62.) Because the appellant has not presented sufficient evidence to support his allegations, he is not entitled to relief on this ground. *See* Rule 32.3 and 32.6(b), Ala. R. Crim. P.

V.

The appellant's fifth argument is that his trial attorneys rendered ineffective assistance during the voir dire proceedings. First, he contends that his attorneys did not engage in probing voir dire of four veniremembers who expressed some opposition to the death penalty and that, in fact, they "made no attempt to rehabilitate those jurors, but merely objected to their excusal for cause." (Appellant's brief at p. 58.) He further asserts that they should have attempted to rehabilitate those venire-members so the State would have been required to use peremptory challenges to remove them from the venire. In denying relief on this claim, the circuit court found:

> "At the evidentiary hearing, Williams presented no evidence to support his claim.
>
> "In not presenting any evidence to support his conclusory allegations, Williams fails to meet the burden of proof required by Rule 32.3 of the Alabama Rules of Criminal Procedure. Additionally, Williams has not shown that trial counsel's performance was outside 'the wide range of reasonable professional assistance.' *Strickland*, 466 U.S. at 689[, 104 S.Ct. 2052]."

(C.R.662.) We agree with the circuit court's findings and adopt them as part of this opinion.

*833 Furthermore, contrary to the appellant's

assertion, the record of his trial shows that his attorneys did indeed question and attempt to rehabilitate each of the four veniremembers to whom the appellant refers in his brief on appeal. (R. 149-52, 158-59, 165-69.) However, the trial court properly excused those veniremembers for cause because each stated that he or she would not vote to impose the death penalty under any circumstances. *See* § 12-16-152, Ala.Code 1975. Accordingly, the appellant's argument is refuted by the record and is without merit.

Second, the appellant contends that his attorneys did not adequately question or challenge for cause veniremembers who expressed bias against him or in favor of the prosecution. He asserts that four veniremembers stated during voir dire examination that they believed from what they had learned through media coverage of the case that the victim's automobile had been stolen. He concludes that his attorneys rendered ineffective assistance because they "did not further question these jurors to discover the extent or depth of their bias in favor of the prosecution." (Appellant's brief at p. 59.) The circuit court made the following findings concerning this contention:

> "At the evidentiary hearing, Williams presented no evidence to support this claim.
>
> "In not making any argument or presenting any evidence to support his conclusory allegations, Williams fails to meet the burden of proof required by Rule 32.3 of the Alabama Rules of Criminal Procedure. Additionally, Williams has not shown that trial counsel's performance was outside 'the wide range of reasonable professional assistance.' *Strickland*, 466 U.S. at 689 [, 104 S.Ct. 2052]. There

> has been no showing made that, if trial counsel had asked more questions during voir dire, the result of the trial would have been different. *Strickland*, 466 U.S. at 694[, 104 S.Ct. 2052]."

(C.R.663.) We agree with the circuit court's findings and adopt them as part of this opinion.

Additionally, again contrary to the appellant's assertion, the record of the appellant's trial shows that his attorneys did indeed question each of the four veniremembers about any potential bias they might have had in favor of the prosecution or against him. Upon further questioning, each veniremember stated that she could set aside what she had heard about the case and decide the case based solely on the evidence presented from the witness stand. (R. 209-12, 216-19, 242-47, 251-55.) Therefore, the appellant's argument is refuted by the record and is without merit.

VI.

The appellant's sixth argument is that his trial attorneys rendered ineffective assistance because they did not object to numerous instances of what he contends was egregious prosecutorial misconduct that occurred during the State's closing arguments. Specifically, he contends that his attorneys should have objected because the prosecutor allegedly improperly relied on facts not in evidence,[2] diminished the

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[2] In support of this contention, he cites the prosecutor's comment that the appellant did not have any white friends and the victim did not have any black friends, the comment that the appellant was a "predator" who now had more "rights" than the victim, and the comment that the appellant would not have

presumption of innocence to which he was *834 entitled,[3] and referred to the Bible and the will of God.

> "In reviewing allegedly improper prosecutorial comments, conduct, and questioning of witnesses, the task of this Court is to consider their impact in the context of the particular trial, and not to view the allegedly improper acts in the abstract. *Whitlow v. State,* 509 So.2d 252, 256 (Ala.Cr.App.1987); *Wysinger v. State,* 445 So.2d 435, 438 (Ala.Cr.App.1983); *Carpenter v. State,* 404 So.2d 89, 97 (Ala.Cr.App.1980), *cert. denied,* 404 So.2d 100 (Ala.1981). Moreover, this Court has also held that statements of counsel in argument to the jury must be viewed as delivered in the heat of debate; such statements are usually valued by the jury at their true worth and are not expected to become factors in the formation of the verdict. *Orr v. State,* 462 So.2d 1013, 1016 (Ala.Cr.App.1984); *Sanders v. State,* 426 So.2d 497, 509 (Ala.Cr.App.1982)."

Bankhead v. State, 585 So.2d 97, 106-07 (Ala.Cr.App.1989), aff'd in relevant part, 585 So.2d 112 (Ala.1991), rev'd on other grounds, 625 So.2d 1146 (Ala.1993). Furthermore,

> " '[d]uring closing argument, the prosecutor, as well as defense counsel, has a right to present his impressions from the evidence, if reasonable, and may argue every legitimate inference.' *Rutledge v. State,* 523 So.2d 1087, 1100 (Ala.Cr.App.1987), rev'd

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made as many statements to the police as he did if he were innocent.

[3] In support of this contention, the appellant again cites the prosecutor's comment that an innocent man would not have made as many statements as the appellant made.

on other grounds, 523 So.2d 1118 (Ala.1988) (citation omitted). Wide discretion is allowed the trial court in regulating the arguments of counsel. *Racine v. State,* 290 Ala. 225, 275 So.2d 655 (1973). 'In evaluating allegedly prejudicial remarks by the prosecutor in closing argument, ... each case must be judged on its own merits,' *Hooks v. State,* 534 So.2d 329, 354 (Ala.Cr.App.1987), aff'd, 534 So.2d 371 (Ala.1988), cert. denied, 488 U.S. 1050, 109 S.Ct. 883, 102 L.Ed.2d 1005 (1989) (citations omitted) (quoting *Barnett v. State,* 52 Ala.App. 260, 264, 291 So.2d 353, 357 (1974)), and the remarks must be evaluated in the context of the whole trial, *Duren v. State,* 590 So.2d 360 (Ala.Cr.App.1990), aff'd, 590 So.2d 369 (Ala.1991). 'In order to constitute reversible error, improper argument must be pertinent to the issues at trial or its natural tendency must be to influence the finding of the jury.' *Mitchell v. State,* 480 So.2d 1254, 1257-58 (Ala.Cr.App.1985) (citations omitted). 'To justify reversal because of an attorney's argument to the jury, this court must conclude that substantial prejudice has resulted.' *Twilley v. State,* 472 So.2d 1130, 1139 (Ala.Cr.App.1985) (citations omitted)."

Coral v. State, 628 So.2d 954, 985 (Ala.Cr.App.1992), aff'd, 628 So.2d 1004 (Ala.1993), cert. denied, 511 U.S. 1012, 114 S.Ct. 1387, 128 L.Ed.2d 61 (1994). Finally, during the trial, the trial court repeatedly instructed the jury that statements made by the attorneys were not evidence, that the jury should base its decision on the evidence presented, and that the jury was not to make its decision based on passion, prejudice, or any other arbitrary factor. We presume that the jury followed the trial court's instructions. *See Taylor v. State,* 666 So.2d 36

(Ala.Cr.App.1994), aff'd, 666 So.2d 73 (Ala.1995), cert. denied, 516 U.S. 1120, 116 S.Ct. 928, 133 L.Ed.2d 856 (1996).

In its order denying the appellant's petition, the circuit court addressed the appellant's prosecutorial-misconduct claims as follows:

***835** "Williams contends that trial counsel was constitutionally ineffective for not objecting to various parts of the prosecutor's closing argument at the guilt and penalty phases of the trial. At the evidentiary hearing, Williams presented no evidence to support this claim. Williams called both trial counsel as witnesses, but neither one was asked about their failure to object to any part of the prosecutor's closing argument.

"The jury was instructed that they were the sole triers of the facts and they were to determine the facts. RIII at 239. The jury was also told that during closing argument the attorneys for both parties may 'draw inferences and conclusions from the facts as they remember those facts to be.' RIII at 239. This court further instructed the jury:

" 'In determining what the true facts are in this case, ladies and gentlemen of the jury, you are limited to the evidence as presented from the witness stand and the exhibits which have been marked into evidence. What the lawyers have told you or have said in this case is not evidence. And should not be considered by you as such. It occupies a special category. And that category is like the indictment. Again, it is not evidence.

" 'They have a right and a duty, as I said earlier at

> the appropriate time throughout the trial to argue the evidence as they remember it coming from the witness stand. However, again, the final arbiter and decision as to what evidence is to be is what you remember it to be. Not what the lawyers say they remember it to be.'

"RIII at 249-50. This instruction was sufficient to safeguard Williams' rights. See *Donnelly v. DeChristoforo,* 416 U.S. 637, 646-47[, 94 S.Ct. 1868, 40 L.Ed.2d 431] (1974).

"Williams has not shown that the failure to object to any of the prosecutor's allegedly improper arguments changed the outcome of the proceeding. There is no reasonable probability that the outcome of the proceedings would have been different if these arguments had not occurred. There was overwhelming evidence against Williams, including his own inculpatory statements. Given the evidence against Williams, there is no reasonable probability that these arguments infected the entire trial.

"Williams contends that the prosecutor improperly referred to him as a predator and stated that Timothy Hasser did not have a right to counsel. See paragraph 16(k) of the second amended petition. During his closing argument, the prosecutor stated in relevant part:

> " 'The law has meticulously preserved the precious constitutional rights of Herbert Williams, Jr., as it should, for this is the United States of America. Timothy Hasser did not have the right to counsel. Timothy Hasser did not have the right to a trial by a jury of his peers. Timothy Hasser indeed did not have the right to live, to love, to be loved, to become

all that God would let him be because Herbert Williams, Jr., chose on November the 2nd on the side of that warehouse in Creola, Alabama, to be his judge, his jury, and his [executioner]. And, for that, he must pay.

" 'So when you decide this case, I respectfully ask you to decide it on the facts. That which is crooked cannot be made straight. And that which is wanting cannot be numbered. He's caught at the scene with the body. He ties weights around the body to get rid of the body. Then he tells these stories. It was a dope deal gone bad in Demopolis and he was *836 killed while running away from the dope dealers. It was a dope deal gone bad in Demopolis. But this time he was forced to lie down and he was shot. And then finally it was a dope deal that went down in Creola and I shot him. But I did it because the phantom Nester made me do it.'

"RIII at 235-36. There was nothing improper in the above-cited argument. The prosecutor apparently was responding to trial counsel's argument that Williams was badgered by the police in giving his various statements and contrasting that with this horrible crime.

"Williams contends that trial counsel was ineffective for not objecting to the prosecutor's statement that an innocent man would not have made as many statements as had Williams. See paragraph 16(*l*) of the second amended petition. The prosecutor's comment was a reasonable inference from the evidence wherein Williams made four statements that alleged different facts. *Ward v. State*, 440 So.2d 1227, 1230 (Ala.Crim.App.1983). Williams

has not shown that, if trial counsel had objected to this statement, the result of the trial would have been different.

"Williams next contends that trial counsel should have objected to the prosecutor's references to the Bible. See paragraph 16(m) of the second amended petition. The references to the Bible in no way asked the jury to consider this case on anything but the evidence and the law given by the court. Williams has not shown that, if trial counsel had made an objection to any of such references to the Bible, the result of the trial would have been different.

"Williams contends that trial counsel was ineffective for not objecting to the prosecutor arguing that Williams did not have any white friends and that Timothy Hasser did not have any black friends. See paragraph 16(n) of the second amended petition. Darrell Powell, one of the witnesses called by the State, stated that Williams did not have any white friends. RVI at 570. This testimony was presented in rebuttal to Williams' claims in his various statements that he and Timothy Hasser were friends. The prosecutor was merely commenting on the evidence and trial counsel was not ineffective for not objecting to the statement. In fact, there is no legal basis for such objection under the facts in this case.

"Williams contends that trial counsel was ineffective for not objecting to the prosecutor's comments made at the sentencing hearing before this court on how long it took to bring Williams' case to trial. See paragraph 16(*o*) of the second amended petition. Actually, the prosecutor was referring to how much time had passed since the murder and was

not commenting on how long it had taken for the case to be brought to trial. The comments of the prosecutor on how many days had passed since the murder had no impact on the sentence. There is no reasonable probability that, if trial counsel had objected to the above-cited passages from the prosecutor's closing argument, the result of the trial would have been different."

(C.R.666-70.) The records of the trial and the Rule 32 proceedings support the circuit court's findings. Therefore, we adopt them as part of this opinion. Accordingly, because the appellant has not shown that his attorneys rendered ineffective assistance in this regard, he is not entitled to relief on these grounds.

VII.

The appellant's seventh argument is that his trial attorneys rendered ineffective assistance because they did not object to *837 allegedly improper jury instructions given during the guilt phase of his trial.

A.

First, the appellant contends that his attorneys should have objected to the trial court's instruction on reasonable doubt. Specifically, he challenges the portion of the instruction that stated, "In order to justify an acquittal, you must have an actual and substantial doubt and not a mere possible doubt" (T.R. 242), arguing that it shifted the burden of proof to him and increased the threshold the jury must reach before finding that a reasonable doubt existed. However, we addressed and rejected this challenge to the trial court's reasonable doubt instruction on direct appeal. *See Williams*, 627 So.2d at 991-92. Therefore, because

the appellant's claim about the trial court's reasonable doubt instruction is without merit, his ineffective-assistance-of-counsel claim based on his attorneys' failure to object to the instruction is likewise without merit.

B.

Second, the appellant contends that his attorneys should have objected to the trial court's instructions on the voluntariness and admissibility of his confessions. Specifically, he asserts that the instructions were confusing and misleading and improperly encouraged the jury to give great weight to his statements. The trial court instructed the jury regarding confessions as follows:

"Also in this particular case, ladies and gentlemen of the jury, you have heard testimony concerning certain confessions or what purport to be confessions. A confession is an admission or statement against interest made by the Defendant relative to the offense here charged. The law in this respect is that all confessions are presumed to be involuntary unless they are first shown to have been voluntarily made. That is, the confession was made by the Defendant freely and voluntarily and without any threat or fear or the offer or hope of reward or otherwise. And the burden is first upon the court to determine such questions for the purpose of admitting or refusing its admission into evidence in the case.

"In this connection, the burden is on the State to satisfy you, the jury, beyond a reasonable doubt that the confession or statement against interest of the Defendant was a voluntary statement and was given by him without fear of punishment or hope of reward

on the part of those who had him in custody at the time of the alleged giving and making of such statements.

"The alleged confessions of the Defendant or statements against interest made by the Defendant, as you are aware, have been allowed into evidence by the court. And the same is before you as part of the evidence in this case. However, the jury is not bound by the alleged confessions of the Defendant. Though I would tell you that confessions of guilt when freely and deliberately made are among the most effectual and satisfactory proofs that can be received in courts of law.

"And although the court has allowed the confessions to come in, whatever you the jury determine to be [the] truth, if you are nevertheless satisfied that they were obtained unlawfully or by wrongful means such as threat or fear of punishment or hope of reward or anything like that, then you have a right to disregard such a confession. And, in such event, you would then look to all the other evidence in this case to see if there is sufficient evidence apart from the confessions whereby you're convinced beyond *838 a reasonable doubt the guilt of the Defendant because, again, it must be from the evidence believed by you that establishes the guilt of the Defendant beyond a reasonable doubt before you can convict this Defendant of anything."

(T.R. 254-55.)

In its order denying the appellant's petition, the circuit court addressed this claim as follows:

"Williams' petition makes no argument regarding

how these instructions were confusing and misleading. Williams presented no evidence at the evidentiary hearing to prove this claim.

"In not making any argument or presenting any evidence to support his conclusory allegations, Williams fails to meet the burden of proof required by Rule 32.3 of the Alabama Rules of Criminal Procedure. Additionally, Williams has not shown that trial counsel's performance was outside 'the wide range of reasonable professional assistance.' *Strickland,* 466 U.S. at 689 [, 104 S.Ct. 2052]. There is no reasonable probability that, if trial counsel had objected to certain parts of this court's instructions to the jury, the result of the trial would have been different."

(C.R.672.)

"A trial court has broad discretion in formulating its jury instructions, provided those instructions accurately reflect the law and the facts of the case. *Raper v. State,* 584 So.2d 544 (Ala.Cr.App.1991). A trial court's oral charge to the jury must be construed as a whole, and must be given a reasonable-not a strained-construction. *King v. State,* 595 So.2d 539 (Ala.Cr.App.1991); *Kennedy v. State,* 472 So.2d 1092 (Ala.Cr.App.1984)."

Williams v. State, 710 So.2d 1276, 1305 (Ala.Cr.App.1996), aff'd, 710 So.2d 1350 (Ala.1997), cert. denied, 524 U.S. 929, 118 S.Ct. 2325, 141 L.Ed.2d 699 (1998). After reviewing all of the trial court's instructions regarding confessions in the context of its entire oral charge, we conclude that they were not improper. They did not inform the jury that the trial court had determined that the appellant voluntarily

made the statements, and they clearly instructed the jury that it was ultimately responsible for determining whether the appellant voluntarily made the statements. *See Bush v. State,* 523 So.2d 538 (Ala.Cr.App.1988); *Ex parte Singleton,* 465 So.2d 443 (Ala.1985). Because the instructions accurately reflected the law and the facts of the case, there was not a basis for an objection by counsel in this regard. Therefore, his trial attorneys did not render ineffective assistance by not objecting to these instructions.

VIII.

The appellant's eighth argument is that his trial attorneys rendered ineffective assistance because they did not object to the trial court's decision to override the jury's recommendation that he be sentenced to imprisonment for life without the possibility of parole. On direct appeal to this court, the appellant argued that the trial court had erred in overriding the jury's recommendation. However, we rejected his argument, stating that Alabama's death penalty statute allows the trial court to override the jury's recommendation if the aggravating circumstances outweigh the mitigating circumstances. *See Williams,* 627 So.2d at 992. Furthermore, the circuit court addressed this claim as follows:

> "Williams contends that trial counsel 'failed to object adequately to the impropriety of the trial court's rejecting the jury's life verdict in this case.' See paragraph 16(bb) of the second amended petition. Williams' petition contains no ***839** further argument to support this claim. At the Rule 32 evidentiary hearing, Williams presented no evidence to prove this claim.

> "Alabama law places capital sentencing authority in the trial judge, but requires the judge to strongly consider an advisory jury verdict. Ala.Code § 13A-5-47(e) (1975). The United States Supreme Court has held that this statute, which does not define the weight a sentencing judge must give to an advisory jury verdict, does not violate the Constitution. *Harris v. Alabama,* [513 U.S. 504,] 115 S.Ct. 1031, 1037[, 130 L.Ed.2d 1004] (1995). Trial counsel cannot be ineffective for [not] making an argument that the United States Supreme Court has rejected. In addition, the trial court, following the dictates of *Furman v. Georgia,* 408 U.S. 230[238, 92 S.Ct. 2726, 33 L.Ed.2d 346] (1972), must make sure the sentencing of all cases be evenly applied. The facts of this case demanded that the sentence be death."

(C.R.682-83.) For the above-stated reasons, the appellant has not shown that his trial attorneys rendered ineffective assistance by not objecting to the trial court's decision to override the jury's sentencing recommendation.

IX.

The appellant's ninth argument is that his appellate attorneys rendered ineffective assistance because they did not raise numerous allegedly meritorious issues in their brief to this court. In this regard, he alleges: "Under Alabama's plain error rule, even errors that were not preserved at trial must be reviewed by the appellate courts in death penalty cases. Thus, appellate counsel could have raised numerous issues even if they were not raised at trial. The failure to do so prejudiced Mr. Williams by precluding appellate review of meritorious claims that

would have required reversal." (Appellant's brief at p. 67-68.) Thereafter, he refers to a list of allegedly meritorious claims he presented in his petition.

Initially, we note that Rule 45A, Ala. R. App. P. provides as follows:

> "In all cases in which the death penalty has been imposed, the Court of Criminal Appeals shall notice any plain error or defect in the proceedings under review, whether or not brought to the attention of the trial court, and take appropriate appellate action by reason thereof, whenever such error has or probably has adversely affected the substantial right of the appellant."

Therefore, on direct appeal, as required by Rule 45A, "[w]e ... searched the record for any error which would have adversely affected the appellant's substantial rights and ... found none." *Williams*, 627 So.2d at 994. Accordingly, contrary to the appellant's contention, the fact that his appellate attorneys did not raise certain issues on appeal did not preclude this court from searching the record for any error that would have required reversal. Furthermore, the circuit court addressed this claim as follows:

> "Williams contends that his appellate counsel was constitutionally ineffective for not raising 'a number of meritorious claims in his appeals to the Alabama Court of Criminal Appeals and the Alabama Supreme Court.' See paragraph 17 of the second amended petition. Williams then lists many of the claims of ineffective assistance of trial counsel as examples of the 'meritorious claims' that should have been raised on appeal. See paragraph 17(a)-23 of the second amended petition.

"On direct appeal, Williams was represented by Al Pennington and Greg Hughes. Both of these appellate lawyers ***840** raised numerous issues that were addressed by both Alabama appellate courts. Neither of these counsel were called as witnesses by Williams at the Rule 32 evidentiary hearing. Therefore, it is unknown if these counsel did not raise certain issues in an effort to winnow out any weaker issues. Furthermore, counsel does not have a duty to raise every nonfrivolous issue on appeal. *Jones v. Barnes,* 463 U.S. 745[, 103 S.Ct. 3308, 77 L.Ed.2d 987] (1983). Williams has not alleged any facts or offered any evidence to support his conclusion that appellate counsel was constitutionally ineffective. This claim is denied because it lacks merit."

(C.R.683-84.) We agree with the circuit court's findings and adopt them as part of this opinion. Additionally, we note that, although he lists several issues that he contends were meritorious and would have required reversal if his attorneys had raised them on direct appeal, the appellant has not satisfied his burden of proving that his attorneys rendered ineffective assistance by not raising them and has not shown that he was prejudiced thereby. We have reviewed the allegedly meritorious issues that the appellant contends appellate counsel should have raised on appeal, and we conclude that there was no error, plain or preserved, with regard to those issues. Therefore, the appellant has not satisfied his burden of proving that his appellate attorneys rendered ineffective assistance by not raising those issues on appeal.

X.

The appellant's tenth argument is that the trial

court erred in denying his request to be treated as a youthful offender. This claim is procedurally barred because the appellant could have raised it at trial and on direct appeal, but did not. *See* Rule 32.2(a)(3) and (a)(5), Ala. R.Crim. P.

XI.

The appellant's eleventh argument is that, in several instances, the trial court improperly limited his attorneys' ability to conduct a thorough voir dire examination. This claim is procedurally barred because the appellant either did object or could have objected to each of these instances at trial and could have raised this argument on direct appeal, but did not. *See* Rule 32.2(a)(2), (a)(3), and (a)(5), Ala. R.Crim. P.

XII.

The appellant's twelfth argument is that the trial court improperly refused to allow his attorneys to pose additional questions to veniremembers who expressed some opposition to the death penalty, in violation of *Witherspoon v. Illinois,* 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). As the circuit court found, this claim is procedurally barred because the appellant could have raised it at trial and on direct appeal, but did not. *See* Rule 32.2(a)(3) and (a)(5), Ala. R.Crim. P. Furthermore, for the reasons stated in Part V of this opinion, this argument is without merit.

XIII.

The appellant's thirteenth argument is that the trial court improperly refused to excuse for cause veniremembers who expressed bias against him, thus causing him to use peremptory challenges to remove them from the venire. With respect to veniremember D.

B., this claim is procedurally barred because the appellant objected on this ground at trial (R. 211-12) and could have objected on this ground on direct appeal, but did not. *See* Rule 32.2(a)(2) and (a)(5), Ala. R.Crim. P. With respect to the remaining veniremembers, this claim is procedurally barred because the appellant could have raised it at trial ***841** and on direct appeal, but did not. *See* Rule 32.2(a)(3) and (a)(5), Ala. R.Crim. P. Additionally, for the reasons stated in Part V of this opinion, this argument is without merit.

XIV.

The appellant's fourteenth argument is that, for several reasons, the trial court improperly denied his motion to suppress evidence seized during a search of his grandmother's residence. At trial, he challenged the search of the residence on some of the grounds he now raises. Therefore, these claims are procedurally barred because the appellant either did raise or could have raised them at trial and because he could have raised them on direct appeal, but did not. *See* Rule 32.2(a)(2), (a)(3), and (a)(5), Ala. R.Crim. P.

XV.

The appellant's fifteenth argument is that the trial court improperly admitted into evidence several photographs that he contends were inflammatory and highly prejudicial. At trial and on direct appeal, the appellant objected to the admission of only one of the photographs. (R. 411); *Williams*, 627 So.2d at 996. Therefore, the appellant's claim is procedurally barred because he either raised it at trial and on direct appeal or could have raised it at trial and on direct appeal, but did not. *See* Rule 32.2(a)(2), (a)(3), (a)(4), and (a)(5),

Ala. R.Crim. P.

XVI.

The appellant's sixteenth argument is that the trial court improperly ordered him to give hair samples to the State, thus allegedly violating his right against self-incrimination. This claim is procedurally barred because the appellant could have raised it at trial and on direct appeal, but did not. *See* Rule 32.2(a)(3) and (a)(5), Ala. R.Crim. P.

XVII.

The appellant's seventeenth argument is that "[t]he extremely low funding provided for indigent defense by the State of Alabama deprived [him] of his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments, the Alabama Constitution, and Alabama law." (Appellant's brief at p. 77.) To the extent that this argument constitutes a challenge to the statutory limit on attorney's fees in capital cases, it is procedurally barred because the appellant could have raised it at trial and on appeal, but did not. *See* Rule 32.2(a)(3) and (a)(5), Ala. R.Crim. P. Furthermore, Alabama courts have repeatedly held that caps on attorney's fees for indigent defendants do not violate the separation of powers doctrine, do not constitute a taking without just compensation, do not deprive indigent capital defendants of the effective assistance of counsel, and do not deny equal protection. *See Ex parte Smith*, 698 So.2d 219 (Ala.), cert. denied, 522 U.S. 957, 118 S.Ct. 385, 139 L.Ed.2d 300 (1997); *Ex parte Grayson*, 479 So.2d 76 (Ala.1985), cert. denied, 474 U.S. 865, 106 S.Ct. 189, 88 L.Ed.2d 157 (1985); *Sparks v. Parker*, 368 So.2d 528 (Ala.1979), appeal dismissed, 444 U.S. 803, 100 S.Ct. 22, 62 L.Ed.2d 16 (1979); *Boyd v. State*,

715 So.2d 825 (Ala.Cr.App.1997), aff'd, 715 So.2d 852 (Ala.), cert. denied, 525 U.S. 968, 119 S.Ct. 416, 142 L.Ed.2d 338 (1998); *Slaton v. State,* 680 So.2d 879 (Ala.Cr.App.1995), aff'd, 680 So.2d 909 (Ala.1996), cert. denied, 519 U.S. 1079, 117 S.Ct. 742, 136 L.Ed.2d 680 (1997); *Barbour v. State,* 673 So.2d 461 (Ala.Cr.App.1994), aff'd, 673 So.2d 473 (Ala.1995), cert. denied, 518 U.S. 1020, 116 S.Ct. 2556, 135 L.Ed.2d 1074 (1996); *Johnson v. State,* 620 So.2d 679 (Ala.Cr.App.1992), rev'd on other grounds, 620 So.2d 709 (Ala.1993), cert. denied, ***842** 510 U.S. 905, 114 S.Ct. 285, 126 L.Ed.2d 235 (1993); *Smith v. State,* 581 So.2d 497 (Ala.Cr.App.1990), rev'd on other grounds, 581 So.2d 531 (Ala.1991).

Additionally, to the extent this is an ineffective-assistance-of-counsel claim, it is without merit. As set forth above, the circuit court found that the appellant's attorneys rendered effective assistance at trial and on direct appeal. The records of the appellant's trial and the Rule 32 proceedings support those findings. Therefore, the appellant has not satisfied his burden of proof under *Strickland* or Rule 32.3 and 32.6(b), Ala. R.Crim. P., and he is not entitled to relief on this claim.

For the above-stated reasons, the circuit court properly denied the appellant's Rule 32 petition. Accordingly, we affirm the circuit court's judgment.

AFFIRMED.

LONG, P.J., & McMILLAN, COBB, & FRY, JJ., concur.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 07-11393-P

HERBERT WILLIAMS, JR.,

Petitioner-Appellant,
versus

COMMISSIONER RICHARD F. ALLEN,

Respondent-Appellee.

On Appeal from the United States District Court for the Southern District of Alabama

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ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

Before: BIRCH, DUBINA and WILSON, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT: November 13, 2008

UNITED STATES CIRCUIT JUDGE ORD-42

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(2)

No. 08-1032

In the
Supreme Court of the United States

RICHARD F. ALLEN,
Commissioner of Alabama Dept. of Corrections,
Petitioner,

v.

HERBERT WILLIAMS, JR.,
Respondent.

On Petition for a Writ of Certiorari to
The Court of Appeals for
the Eleventh Circuit

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTION PRESENTED

Did the Court of Appeals for the Eleventh Circuit err in holding that the state courts' denial of Herbert Williams's penalty ineffective assistance of counsel claim involved an unreasonable application of *Strickland v. Washington*, 466 U.S. 668 (1984), when: as a result of trial counsel's failure to investigate their client's life history, (i) the jury and sentencing judge never learned of several categories of mitigation of precisely the type that this Court has found to undermine confidence in a death sentence, and (ii) that mitigation discredited the portrait of Williams's background the judge relied upon in overriding the jury's 9-3 life recommendation?

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STATEMENT OF THE CASE

This petition arises from a death judgment entered by Alabama Circuit Court Judge Ferrill McRae, overriding the jury's 9-3 recommendation of a life sentence for 19-year-old Mr. Herbert Williams, Jr. At state postconviction, Williams was denied sentencing relief, notwithstanding compelling evidence of the neglect and abuse that he suffered throughout his life—evidence that refuted the trial court's sentencing analysis, but that was not presented at sentencing because of trial counsel's failure to investigate readily available mitigating evidence.

In federal habeas proceedings, the Court of Appeals for the Eleventh Circuit straightforwardly applied *Strickland v. Washington*, 466 U.S. 668 (1984), correctly concluding that Williams established both components of an ineffectiveness claim, that the Alabama Court of Criminal Appeals' application of *Strickland* was unreasonable, and that Williams was entitled to habeas relief as to his sentence. App. 37a-38a. The panel decision was unanimous. No judge on the Court of Appeals voted for *en banc* review in response to Commissioner Allen's request. App. 167a.

There is nothing novel or noteworthy about the Eleventh Circuit's opinion in this case. Petitioner has presented no argument that meets the requirements of this Court's Rule 10: Petitioner has not pointed to anything in the Court of Appeals' opinion that creates a split in the circuits or warrants an exercise of this Court's

supervisory power, *see* SUP. CT. R. 10(a); nor has Petitioner identified any important question of federal law that has not been but should be resolved by this Court, *see* SUP. CT. R. 10(c). Moreover, Petitioner recognizes that the decision below is not final, Cert. Pet. at 15 n.4, but does not argue that this case presents special circumstances that overcome the Court's "ordinar[y] reluctan[ce] to exercise . . . certiorari jurisdiction" over nonfinal decisions of the lower federal courts. *Mazurek v. Armstrong*, 520 U.S. 968, 975 (1997).

The Eleventh Circuit's straightforward application of clearly established law to the facts of this case is correct and does not warrant further review. Although the Commissioner asserts that the petition presents an important federal question because the Eleventh Circuit purportedly "blurr[ed] the distinction between excluding and weighing mitigating evidence," Cert. Pet. at 18, it is actually Petitioner that blurs the distinction between cases addressing the role of the sentencer and cases addressing the role of the postconviction court under *Strickland*, in evaluating mitigating evidence. In any event, Petitioner's argument does not affect the Court of Appeals' judgment because: (1) the facts of this case are materially indistinguishable from *Williams v. Taylor*, 529 U.S. 362 (2000), and thus this Court's holding in *Williams* that *Strickland* required relief applies equally here; (2) the state courts unreasonably applied *Strickland* by failing to consider the totality of Respondent's mitigating evidence; and (3) the state courts unreasonably

failed to acknowledge *Strickland*'s holding that prejudice is more difficult to establish in highly aggravated cases than in cases (such as this one) where the death sentence is only weakly supported by the record.

A. Conviction and Sentence

On November 2, 1988, Williams was arrested while driving the Porsche of Mr. Timothy Hasser, north of Mobile, Alabama. Hasser's body was in the backseat. App. 3a. Police suspected that Hasser and Williams knew each other, and questioned acquaintances of Williams who confirmed that Williams had mentioned to them that he had a friend named Tim who owned a Porsche. Vol. 4 at 125-26, 161, 181-90; Vol. 6 at 149-53.

Thereafter, Williams was indicted for murder during the course of a robbery in violation of Ala. Code § 13A-5-40(a)(2) (1975). At the guilt phase, the parties split sharply over a number of key points. The prosecution asserted that Williams and Hasser were strangers, and Williams was guilty of capital robbery-murder because he had shot Hasser while stealing his car. *See, e.g.*, Vol. 7 at 46-56.

Williams, on the other hand, asserted that he was not guilty of capital murder. He dealt drugs for Hasser, who promised him the car as payment. Williams did not break into Hasser's home, as the prosecution alleged—Hasser had provided him with the security code (of which he was able to provide correctly three of the four numbers, *see* Vol. 4 at 93, Vol. 5 at 57). After the two drove to

Creola, Alabama, for a drug transaction Hasser had arranged, drug dealers, not Williams, killed Hasser, and ordered Williams to dispose of his body. *See, e.g.*, Vol. 7 at 57-65.[1]

On February 16, 1990, the jury found Herbert Williams guilty of capital murder.

The penalty phase commenced and concluded that day. The State presented no additional evidence, and the defense presented only one witness, Williams's mother, Arcola Williams. In four pages of testimony, she stated: it "seem[ed] like" Williams's father, Herbert Williams, Sr., "whipped [Williams] more than he should," though she noted that "children have to be whipped sometimes"; during Williams's early childhood, Williams, Sr., "g[ot] drunk" regularly and used marijuana, and had beaten her in front of Williams; and, at the time of the trial, Williams, Sr., was in jail, charged with raping their mentally retarded daughter, Mabel. Vol. 7 at 119-22.

The jury voted 9-3 that Williams be sentenced to life without parole. *Id.* at 149.

Judge McRae scheduled sentencing for April. *Id.* at 152. Despite knowing that Judge McRae had previously overridden other juries' life recommendations,

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[1] Prior to trial, the prosecution offered Williams a deal wherein he would be sentenced to life without parole if he pleaded guilty and gave a confession that did "*not* include any alleged narcotics transaction gone awry." Am. Pet., 7/31/02, Doc. No. 15, at 10 n.6 (citing letter dated 1/18/1990).

and with almost two months to prepare, trial counsel presented no additional mitigating evidence at sentencing and repeated without verification the presentence investigation report's (PSI's) characterization of Arcola Williams as having an "excellent reputation" in the Thomasville, Alabama area. Vol. 5 at 180; *see* Vol. 1 at 108. Judge McRae embraced counsel's representation, stating that Williams's mother's reputation was beyond reproach and that she was an extremely good person. Vol. 5 at 180. When Judge McRae asked counsel before he pronounced the sentence whether Williams wished to address the court, counsel responded: "Judge, I haven't asked him. I have nothing to say." *Id.* at 183.

Judge McRae overrode the jury's recommendation and sentenced Williams to death.

Of Alabama's eight available aggravating circumstances, *see* Ala. Code § 13A-5-49 (1975), the trial court found the existence of only one: that the capital offense was committed during the commission of a robbery. Vol. 5 at 188-90. Judge McRae explicitly found that "the capital offense was not especially heinous, atrocious or cruel compared to other capital offenses." *Id.* at 190. The court also found two statutory mitigators, Williams's youth and his lack of any criminal record, and one non-statutory mitigator, that his "father was violent and abusive towards him as a child." *Id.* at 190, 192. However, Judge McRae minimized the import of this non-statutory mitigator, stating that because Williams's mother and

grandmother "appeared to be decent people who genuinely cared for [him,] [i]t . . . would strain credulity to find that [his] background was one of total deprivation." *Id.* at 192.[2] Finally, the court recognized that the jury's 9-3 life recommendation was due "very serious consideration and substantial weight." *Id.* at 193. Nonetheless, Judge McRae concluded that the sole aggravator outweighed the three mitigators and the jury's life without parole recommendation. *Id.*

B. State Postconviction Proceedings

After Williams's sentence was affirmed on direct appeal, he timely sought state postconviction relief, pursuant to Rule 32 of the Alabama Rules of Criminal Procedure. At an evidentiary hearing, Williams presented persuasive evidence that his trial had been rendered fundamentally unfair by counsel's failure to investigate and present a lifetime history of abuse and neglect at the hands of both parents, along with the psychological impact of that abuse and neglect.

1. Deficient Performance

The attorney responsible for the penalty-phase investigation in Herbert Williams's capital trial was an appointed counsel who "was reluctant to represent [Williams]." Vol. 13 at 55. By his own account, counsel did "'not do[] much of anything other than legal research,' and non-witness-related trial preparation." App. 16a. Indeed, despite red flags that would have led any reasonable attorney to

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[2] As the Eleventh Circuit noted, Williams's grandmother testified during the guilt phase of his trial. App. 8a n.2.

investigate further, and "despite the availability of several of Williams' family members, trial counsel sought mitigating evidence from only one person with firsthand knowledge of his background: his mother." App. 26a-27a. The Eleventh Circuit correctly applied this Court's clearly established law to hold that counsel's lack of investigation constituted deficient performance under *Strickland*, and that the state courts' contrary conclusion was unreasonable. App. 21a-31a. Commissioner Allen does not seek review of this holding. Cert. Pet. at 30.

2. Counsel's Deficient Performance was Prejudicial

In stark contrast to the portrait of Williams's life presented at the penalty phase—in which one parent acted kindly, and took care of Williams, and the other engaged in corporal punishment that sometimes crossed the line—had trial counsel investigated readily available evidence, they would have learned that: (1) both parents neglected Williams severely, such that his basic needs went unmet; (2) Arcola Williams physically abused Williams and facilitated her husband's criminal assaults; (3) Williams, Sr., did not just whip Williams "more than he should" have; he used weapons and other forms of brutality against Williams and other family members throughout Williams's time living with his parents; and (4) Williams had a troubled psychiatric history resulting from this violent, neglectful background.

The postconviction evidence showed unmistakably that Williams's childhood was one of severe neglect, abject fear and terror. And, because

Williams's mother moved the family to an isolated trailer to keep far away from neighbors who could report this abuse and neglect, Williams had no outlet from his harrowing world.

a. Deprivation and Neglect

As noted, at sentencing, trial counsel repeated the PSI's description of Arcola Williams as having an "excellent reputation"—a characterization the trial judge relied on to discount the sparse mitigation. However, had trial counsel spoken with available witnesses, they would have learned the following.

Arcola Williams left her children's basic needs unmet. Vol. 14 at 59, 93-94, 98; Supp. Vol. 9 at 1122-23. She considered Williams old enough to wander the neighborhood unsupervised by the time he was four or five years old such that neighbors perceived that "the neighborhood was his home or was his parents." Vol. 14 at 98; *see also* Supp. Vol. 9 at 1120 (available evidence of Williams's father's neglect). Williams and his siblings frequently ate handouts. Vol. 14 at 98. Williams wore noticeably shabby clothing that marked him as especially deprived, "even by the standards of a rather poor community." *Id.*[3] "[N]o one supervised [Williams's] hygiene and cleanliness"; Williams was unaware that people brushed their teeth daily until he was incarcerated at age nineteen. *Id.* at 99. Arcola Williams's unavailability was tied to a "catastrophic collapse" in Williams's

[3] Contrary to the Petitioner's mischaracterization of her penalty-phase testimony, Cert. Pet. at 5, Arcola Williams never mentioned the family's poverty. *See* Vol. 7 at 118-22.

academic performance resulting in repetition of the fourth grade. *Id.* at 116.

Williams's parents refused to seek medical attention for even serious injuries that he suffered. One laceration that cut to his bone was treated at home and covered for weeks with the same unexamined bandage. When Williams, Sr., learned that the school principal had the impression that Williams, Sr., caused the injury, he beat Williams severely because he believed that Williams "put[] that idea into their heads." *Id.* at 100.

In sum, Williams suffered abject poverty and "extreme[] . . . deprivation" because of his parents' neglect, *id.* at 98; he grew up in a home where there were "no good parents," *id.* at 116a. *See* Supp. Vol. 9 at 1120-23.

b. Arcola Williams's Abuse

Similarly inconsistent with the positive sentencing portrait of Arcola Williams is the unrebutted postconviction evidence that she physically abused her children, beating them at her husband's direction in order to "make an example of [them]." Vol. 13 at 123. Like her husband, Arcola Williams used belts or other instruments on the children's bare backs and the backs of their heads so that the bruises would be undetected by strangers. *Id.* at 123-24. As Williams's sister, Queenie May Peoples, testified at Rule 32, "[Arcola Williams] would make us pull off all our clothes except . . . our underwear and . . . lay down across the bed, face down, because they didn't believe in hitting in the front because they would show

bruises and people would know." *Id.* at 123.

Furthermore, Arcola Williams facilitated her husband's brutal assaults on their children. She "never did or . . . said anything" when Williams, Sr., beat Williams. *Id.* at 122. Similarly, although Peoples told her mother that Williams, Sr., was molesting her (beginning at age eight), Arcola Williams never came to her defense. "She took him to his word. She never told us that she believed us for anything that we said. She always took his side." *Id.* at 122. Peoples slept with a knife to protect herself from Williams, Sr., because she knew that her mother would not protect her. *Id.* at 133.

This extreme parental abuse was no secret; many in the community were aware that Herbert Williams was "battered or brutalized at home." Vol. 14 at 102. When one set of neighbors confronted Williams, Sr., about his mistreatment of his family, instead of seeking help, Arcola Williams relocated the family to a trailer in "an isolated part of Thomasville where they wouldn't have any neighbors and wouldn't be troubled." *Id.*; *see also id.* at 118; Vol. 13 at 141-42. As a result of his family's exile, Williams's only reprieve from what the District Court described as the "horror of the abuse" in his home, Order, 3/13/06, Doc. No. 39 ("Hearing Order") at 4, was solitary play in the woods behind the trailer. Vol. 14 at 111.

c. Herbert Williams, Sr.'s, Criminal Abuse

Arcola Williams's trial testimony that it seemed like her husband whipped

Herbert Williams "more than he should" but that "children have to be whipped sometimes," Vol. 7 at 119, barely scratched the surface of the brutality Williams experienced and witnessed. As the Eleventh Circuit recognized, "contrary to the impression created by Arcola Williams, this violence was not of a type remotely associated with ordinary parental discipline. Williams Sr.'s beatings were in fact serious assaults, many of which involved the use of deadly weapons." App. 32a.

Starting when Williams was just four years old, Williams, Sr., beat him mercilessly with a belt several times a week until Williams, Sr., was too exhausted to continue. Vol. 14 at 97, 100, 103. "[Williams, Sr.,] just hang [Williams] up in the air by his arm and just go until he was tired . . . . He would hold him up by his arm and he would take the belt, and, see, they doubled the belt and they just beat, and when they got tired with one arm, they just switched sides." Vol. 13 at 145-46; *see also id.* at 145 (describing Williams, Sr., forcing Williams to spend an entire day in a hole dug for a septic tank); Supp. Vol. 9 at 1121 (Williams's grandmother recounting incident when Williams "came to my house and had bruises all over the side of his face and neck from his daddy hitting him"). Nor did the abuse cease as Williams grew older. Vol. 14 at 97. In fact, shortly before Williams left home permanently at seventeen, his father broke a chair over his head. *Id.* at 121.

In addition to the physical abuse he suffered, Williams watched his father beat his mother severely and relentlessly. Vol. 13 at 132; App. 10a. "On one

occasion, Williams Sr. struck his wife in the mouth so hard that he broke the bridge of her false teeth." App. 10a. On another occasion, Williams, Sr., forced Arcola Williams onto all fours, and brandished a long knife while threatening to decapitate her. When the police arrived in response to Peoples reporting the incident, both parents told the police that Peoples had "made it up." Williams, Sr., was not arrested. Vol. 13 at 125-26. On yet another occasion, Williams, Sr., shot a pistol at Arcola Williams, but "he was so drunk that [he missed] and the bullet went in the sofa right beside [Peoples]." *Id.* at 127.

Williams, Sr., also brutalized Williams's siblings in front of Williams. Williams watched his father throw scissors at Peoples, *id.* at 129, and pummel his mother's belly while she was pregnant with his younger brother, Thomas, *id.* at 117. Similarly, Williams and Peoples believed that their sister Mabel's severe mental retardation resulted from their father assaulting Arcola Williams while Mabel was in utero. Vol. 14 at 108. In another incident, when Williams, Sr., could not locate his stash of marijuana, he went on a rampage and accused Peoples and Williams of taking it. He later discovered two-year-old Thomas eating the marijuana:

> [Williams, Sr.,] became very furious. So, he took his belt and he beat [Thomas] with the belt, and Thomas just went to screaming and crying and he wouldn't stop. So, [Williams, Sr.,] . . . threw him and when he did, he went up side the wall. He hit the wall . . . and [Williams, Sr.,] told him to hush and not to say another word. Well, eventually when he stopped crying, he went to sleep, and when he

woke up, he never spoke another word . . . til he was six years old. .

Vol. 13 at 118-19; *see also* Vol. 14 at 83. Unsurprisingly, the children lived in "pervasive terror and fear . . . . And by all accounts, Herbert [Williams] was much more regularly beaten than Tommy was." Vol. 14 at 117.

d. Psychological Impact on Williams

As psychiatrist Eliot Gelwan testified at Rule 32, Herbert Williams experienced an "almost total lack of parental functioning [and] protection . . . . The [resulting] effects . . . are incalculable." Vol. 14 at 106. From ages four to seventeen, the "inescapable" abuse from both parents resulted in Williams's "extreme brutalizing exposure to trauma." *Id.* at 97; *see also id.* at 109-110. Moreover, "the significance that [watching brutal assaults by one's father against one's mother during her pregnancies] has to a child is that it is an ultimate perversion . . . of parenting as the protection, preservation, and promotion of life." *Id.* at 105. Arcola Williams's failure to protect the children from severe abuse resulted in a "sense of betrayal by the mother tha[t] the children were never supported and never believed." *Id.* at 116b. Ultimately, Williams fled "in fear for his life." *Id.* at 117.

The damaging effects of the abuse and neglect Williams suffered were readily discoverable. Williams begged his grandmother to let him live with her, and, as she explained, he "never wanted to go back [to his parents' home] after he

visited me. He would hide . . . and refuse to come out when his mother came . . . . [O]ne of the ways [Williams] tried to escape from home was by [quitting school and] going to the Job Corps[.]" Supp. Vol. 9 at 1121-22; *see also* Vol. 14 at 119-20.

Had counsel requested Williams's Job Corps records, they would have learned that: while there, a dorm supervisor had to divest Williams of the razor-blade with which he intended to slit his wrists; Williams reported having similar problems as a child; he was diagnosed with "major depression" and admitted for inpatient observation as a suicide precaution; and he was later referred to a psychiatrist for drug therapy. Supp. Vol. 8 at 986-88; *see also* Vol. 14 at 120. It was recommended that Williams be examined by a psychiatrist if he departed the program. *Id.* Gelwan's interviews with Williams's family members confirmed that they were aware of his serious psychological problems upon his return from the Job Corps. Vol. 14 at 120; *see also* Supp. Vol. 9 at 1122.[4]

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[4] Petitioner attempts to obscure the issues before this Court by spending several pages addressing Gelwan's diagnosis that Williams suffered from post-traumatic stress disorder (PTSD), and noting that the Eleventh Circuit did not discuss the testimony of the State's postconviction psychological expert, Dr. Karl Kirkland. *See* Cert. Pet. at 8-11 & n.1. However, in the Eleventh Circuit, "[t]he only evidence from Dr. Gelwan's testimony that Williams . . . cited [were] the factual assertions drawn from [Gelwan's] investigation into Williams's background." App. 29a n.8. Kirkland disagreed with Gelwan's PTSD diagnosis, but not with Gelwan's social history—which included interviews with nine of Williams's family members, three of his former neighbors, and two former teachers, Vol. 14 at 85. Contrary to Petitioner's inaccurate description of the record, Cert. Pet. at 10, Kirkland testified that he spoke with only *one* of Williams's relatives, who was unaware of the violence Williams suffered, but that he relied on Gelwan's social history in his own evaluation of Williams, and that he had "no reason to doubt that [Williams came from] a dysfunctional abusive home[.]" Vol. 14 at 182, 195.

3. Judge McRae's Injudicious Handling of the Rule 32 Proceeding

The overwhelming record supporting sentencing relief was accomplished despite Judge McRae's frequent interruptions of mitigation witnesses, repeated insertion of his own testimony vouching for Williams's trial counsel, mocking comments about relevant mental health evidence, and other seriously injudicious conduct. *See, e.g.*, Vol. 13 at 53, 55, 57, 67, 84, 113, 122, 129-30, 134-35, 156, 174; Vol. 14 at 2, 86, 135; Vol. 15 at 7, 17-18, 26, 36. As the Eleventh Circuit recognized, "[i]n a number of instances, the judge appeared to take on the role of an advocate against Williams' ineffective assistance claims," and "[o]ther statements [by Judge McRae at Rule 32] suggest an unwillingness to give Williams' mitigating evidence serious consideration." App. 43a n.13 (discussing specific examples); *see also* Hearing Order at 4 (District Court order describing Judge McRae's conduct).

After Rule 32 proceedings, Judge McRae denied relief by entering an order that, in relevant part, copied nearly verbatim the State's proposed order. *Compare* Vol. 15 at 174-83 *with* Supp. Vol. 4 at 626-35. The Court of Criminal Appeals, adopting verbatim the relevant portion of Judge McRae's order, affirmed. App. 131a-140a.

REASONS THE WRIT SHOULD BE DENIED

Certiorari should be denied because the petition seeks review of the Eleventh

Circuit Court of Appeals' faithful application of clearly established law to Respondent's case. Petitioner does not contend that the decision below implicates an important dispute among the lower courts, and Petitioner's assertion that the Eleventh Circuit granted relief in the absence of clearly established law is erroneous. *Strickland v. Washington*, 466 U.S. 668 (1984), supplies the clearly established law, and this Court has unambiguously held that, under *Strickland*, confidence in a death sentence is undermined when, as a result of defense counsel's deficient performance, the sentencer was unaware of compelling mitigating evidence. *Williams v. Taylor*, 529 U.S. 362, 397-98 (2000). Petitioner attempts to obscure the clarity of this legal rule by relying on an inapposite line of authority addressing not *Strickland* claims, but rather Eighth Amendment claims where (unlike here) all relevant mitigating evidence was presented to the sentencer. Cert. Pet. at 17, 24-29.

In any event, the Eleventh Circuit's decision is not an appropriate vehicle for reaching the question presented by the petition. The state courts made multiple unreasonable errors in applying *Strickland*'s prejudice prong; therefore, the narrow issue raised by the Commissioner has no effect on the judgment below.

A. The Court of Appeals for the Eleventh Circuit Faithfully Applied this Court's Precedent; No Further Review of its Fact-Bound Application is Warranted

"It is past question that the rule set forth in *Strickland* qualifies as 'clearly

established Federal law, as determined by the Supreme Court of the United States.'" *Williams v. Taylor*, 529 U.S. at 391 (2000); *see also, e.g., Knowles v. Mirzayance*, 556 U.S. __, slip op. at 10 (Mar. 24, 2009). "That the *Strickland* test 'of necessity requires a case-by-case examination of the evidence,' obviates neither the clarity of the rule nor the extent to which the rule must be seen as 'established' by this Court." *Williams*, 529 U.S. at 391 (citation omitted). In the decision below, the Eleventh Circuit recognized that *Strickland* constitutes the clearly established law that governs this case, and also correctly set forth the rules federal habeas courts must follow to determine whether a state court decision constitutes an "unreasonable application" of *Strickland* within the meaning of 28 U.S.C. § 2254(d)(1). App. 19a-20a.

Contrary to Petitioner's contention, this case bears no resemblance to recent cases in which the Court has reversed grants of relief under 28 U.S.C. § 2254(d)(1). In each of those cases, the Court of Appeals set forth a new legal rule not grounded in this Court's precedent. *See Knowles*, 556 U.S. at __, slip op. at 10 ("This Court has never established anything akin to the Court of Appeals' 'nothing to lose' standard for evaluating *Strickland* claims."); *Wright v. Van Patten*, 128 S.Ct. 743, 746 (2008) ("No decision of this Court . . . clearly establishes that [*United States v. Cronic*, 446 U.S. 648 (1984), the case relied upon by the Court of Appeals] should replace *Strickland* in this novel factual context."); *Carey v.*

Musladin, 549 U.S. 70, 76-77 (2006) ("No holding of this Court required the California Court of Appeal to apply the [cases relied upon by the Ninth Circuit]," because "[i]n contrast to state-sponsored courtroom practices, the effect on a defendant's fair-trial rights of the spectator conduct to which [the habeas petitioner] objects is an open question in our jurisprudence"). Here, the Eleventh Circuit did not create any new legal rule or apply an inapposite line of authority to a novel factual context. Rather, the Court of Appeals applied *Strickland*'s clearly established two-prong test to the facts of this case. App. 20a-38a. Although this is a sufficient basis for denying the Petition, *see* SUP. CT. R. 10, for the reasons discussed below, the Eleventh Circuit's fact-bound application of *Strickland* was also clearly correct.

As the Eleventh Circuit recognized, to satisfy *Strickland*'s prejudice component, a habeas petitioner "'must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result [of] the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" App. 31a (quoting *Strickland*, 466 U.S. at 694). "This standard presumes a reasonable sentencer." *Id.* (citing *Strickland*, 466 U.S. at 695); *see also id.* at 37a (citing *Strickland*, 466 U.S. at 700).

Under this Court's precedent, the postconviction evidence of Herbert Williams's "childhood, filled with abuse and privation" is precisely the type of

evidence that undermines confidence in a death sentence because it "might well have influenced the [sentencer's] appraisal of his moral culpability." *Williams*, 529 U.S. at 398; *see also Wiggins v. Smith*, 539 U.S. 510, 538 (2003). Nonetheless, the Alabama postconviction courts denied relief, concluding that the Rule 32 evidence had "little mitigation value" because it lacked a "causal relationship" to Williams's capital crime. App. 134a, 133a. As the Eleventh Circuit recognized, in reaching this conclusion, the state courts made the same unreasonable error in applying *Strickland* that the Virginia Supreme Court did in *Williams v. Taylor*.[5]

In *Williams v. Taylor*, trial counsel's deficient performance resulted in their failure to present evidence of abuse and neglect in the habeas petitioner's background, which mirrors the evidence of abuse and neglect Herbert Williams's trial counsel failed to investigate here. *Compare* 529 U.S. at 370, 395 *with* App. 9a-15a, 32a-33a. In state postconviction proceedings, the Virginia Supreme Court recognized that trial counsel failed to present available mitigating evidence but concluded that the petitioner, Terry Williams, had not established *Strickland* prejudice. *Williams v. Warden of the Mecklenburg Correctional Ctr.*, 487 S.E.2d 194, 198-200 (1997). The state court recounted the "'overwhelming'" aggravating evidence presented by the State at sentencing, and determined that the

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[5] Contrary to Petitioner's suggestion, Cert. Pet. 15-16, Respondent also made precisely this argument before the Eleventh Circuit. *See Williams v. Allen*, No. 07-11393 (11th Cir.), Brief of Appellant at 44; Reply Brief of Appellant at 23-24.

postconviction mitigation, which did not undermine or rebut any of this aggravating evidence, "barely would have altered the profile of this defendant that was presented to the jury." *Id.* at 199, 200.

On habeas review, this Court held that the Virginia Supreme Court's application of *Strickland*'s prejudice prong was objectively unreasonable. Specifically, this Court explained:

> *Mitigating evidence unrelated to [the aggravating evidence] may alter the [sentencer's] selection of penalty, even if it does not undermine or rebut the prosecution's death-eligibility case.* The Virginia Supreme Court did not entertain that possibility. It thus failed to accord appropriate weight to the body of mitigation evidence available to trial counsel.

529 U.S. at 398 (emphasis added). (In attempting to distinguish *Williams*, Petitioner omits the italicized sentence and then inserts bracketed text that recharacterizes the "possibility" the Virginia Supreme Court failed to entertain. Cert. Pet. at 22.)

As the Eleventh Circuit recognized, the Alabama Court of Criminal Appeals made the very error that the Virginia Supreme Court made in *Williams v. Taylor*. As noted, the Alabama Court of Criminal Appeals denied relief because, even though Herbert Williams presented postconviction mitigation indistinguishable from the mitigation in *Williams*, the state court found he had not proven that evidence had a "causal relationship" to the crime. App. 133a. Thus, as the Eleventh Circuit explained:

> Like the state court [in *Williams v. Taylor*], the Alabama court rested its prejudice determination on the fact that Williams' mitigating evidence did not undermine or rebut the evidence supporting the aggravating circumstance. It did not consider the possibility that the mitigating evidence, taken as a whole, might have altered the trial judge's appraisal of Williams' moral culpability, notwithstanding that the evidence did not relate to his eligibility for the death penalty.

App. 36a.

Petitioner's attempt to distinguish this case from *Williams v. Taylor* is unavailing. *See* Cert. Pet. at 20-22. Notably, Petitioner does not attempt to argue that the new postconviction mitigation here is materially different from the new postconviction mitigation in *Williams*. And, as Petitioner recognizes, in *Williams*, the state court unreasonably denied relief notwithstanding the fact that "a jury might find [the habeas p]etitioner less morally culpable based on the new evidence." Cert. Pet. at 22. That is exactly what happened here. And, just as in *Williams v. Taylor*, the state courts failed to acknowledge this because they did not recognize that "[m]itigating evidence unrelated to [the aggravating evidence] may alter the [sentencer's] selection of penalty, even if it does not undermine or rebut the prosecution's death-eligibility case." *Williams*, 529 U.S. at 398.

Lacking any support in *Williams v. Taylor*, or any of this Court's Sixth Amendment cases, Petitioner relies on a number of differing strands of Eighth Amendment authority; in cobbling them together, Petitioner strains to persuade the Court that it should look away from *Strickland* and its progeny, the cases that

constitute the relevant clearly established law, but which make clear that the petition is bereft of any basis for granting certiorari.

Specifically, Petitioner cites a number of cases standing for the proposition that, while the Eighth Amendment requires resentencing where "'relevant mitigating evidence was placed beyond the effective reach of the sentencer,'" it does not require the sentencer to give any particular weight to that evidence. Cert. Pet. at 27 (quoting *Graham v. Collins*, 504 U.S. 461, 475 (1993)); *see id.* at 2, 17, 25, 26, 28 (citing cases).[6] This is indeed a well-settled Eighth Amendment principle, but to the degree it is relevant in this Sixth Amendment case, it supports the decision below. Here, as a result of trial counsel's deficient performance, the capital sentencer was precluded from giving effect to (indeed, never even learned of) the powerful Rule 32 mitigation. Moreover, in the Eighth Amendment context, the Court has squarely rejected, as "constitutionally inadequate," a state postconviction court's reliance on a causal relationship test to deny relief when relevant mitigating evidence was beyond the reach of the sentencer. *Smith v. Texas*, 543 U.S. 37, 44-45 (2004) (per curiam) (citing, *inter alia*, *Tennard v. Dretke*, 542 U.S. 274, 287 (2004) and *Penry v. Lynaugh*, 492 U.S. 302, 319-22 (1989)). As

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[6] Similarly, in the California Factor K jury instruction cases discussed by Petitioner, the Court has held that "'the proper inquiry . . . is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence.'" *Ayers v. Belmontes*, 549 U.S. 7, 13 (2006) (quoting *Boyde v. California*, 494 U.S. 370, 380 (1990)); *see also* Cert. Pet. at 25 (recognizing that in *Brown v. Payton*, 544 U.S. 133 (2003), "the Court predicated its opinion on the fact that the *jury* was allowed to *consider* all of the defendant's evidence") (first emphasis added).

discussed, this is precisely what happened in the state court's adjudication of Respondent's *Strickland* claim.

Petitioner seeks to obfuscate the fact that this is not a case about the capital sentencer's role in weighing mitigation, but rather a case in which the sentencer was precluded from giving any consideration to Respondent's mitigation, with statements such as: "the [Eleventh Circuit] court of appeals crossed into territory [concerning the weight of mitigating evidence] this Court has historically reserved for the sentencer *and state appellate courts*." Cert. Pet. at 17 (emphasis added); *see id.* at 2, 18. Petitioner confuses the role of the sentencer with that of the state postconviction court. Under clearly established law, the sentencer has wide latitude to weigh mitigating evidence, but the role of a state postconviction court adjudicating a *Strickland* claim is much more limited.

When a habeas petitioner brings an ineffective assistance of counsel claim, the state postconviction court does not consider what weight it would accord the postconviction mitigation were it the sentencer. Rather, the state postconviction court "must ask" only whether the petitioner has shown a reasonable likelihood that the new mitigation would lead a reasonable sentencer to impose a sentence less than death. *Strickland*, 466 U.S. at 694-96; *see also, e.g.*, *Williams*, 529 U.S. at 391; *Wiggins*, 539 U.S. at 534. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694;

see also id. ("[Because a]n ineffective assistance claim asserts the absence of one of the crucial assurances that the result of the proceeding is reliable[,] . . . [t]he result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome.").[7]

Thus, although a state postconviction court adjudicating a *Strickland* claim weighs the new mitigating evidence, it does so only for the limited purpose of determining whether that evidence is sufficient to create a reasonable probability of a different sentence. *See, e.g., Williams*, 529 U.S. at 398 (recognizing that, under *Strickland*, a state postconviction court must reweigh the totality of the mitigating evidence against the aggravating evidence to determine whether there is a reasonable probability that the new mitigation would result in a sentence less than death). This is a well-defined legal inquiry that must be resolved consistent with this Court's precedent. Where, as here, the state postconviction court denies relief because a direct nexus between the crime and the evidence of petitioner's difficult

[7] Because the reasonable probability test assumes a hypothetical, objective sentencer, evidence about how the new mitigation would have affected Judge McRae as a sentencer, *cf.* Cert. Pet. at 7, 13, is "'irrelevant to the prejudice inquiry.'" App. 37a (quoting *Strickland*, 466 U.S. at 700). But even if *Strickland* prejudice were a subjective test, the Rule 32 evidence would undermine confidence in Herbert Williams's death sentence. "Alabama's capital sentencing statute gives the jury an essential role in the sentencing process that is, in fact, as important as the role of the judge." *Brownlee v. Haley*, 306 F.3d 1043, 1077 (11th Cir. 2002). Williams's jury voted for life without parole by a 9-3 margin. Had the Rule 32 evidence been presented at trial, it is reasonably likely that the strength of the jury vote for life without parole would have been 11-1 or 12-0, which, under Alabama law, would have been more difficult for Judge McRae to override. *See Ex Parte Carroll*, 852 So.2d 833, 836 (Ala. 2002).

life history has not been established, the court unreasonably "fail[s] to accord appropriate weight to the body of mitigation evidence available to trial counsel." *Id.* Regardless of the weight the state postconviction court would accord the mitigation if it were the sentencer, a reasonable sentencer may well conclude that this type of mitigation calls for a sentence less than death even absent a direct nexus between that mitigation and the crime—and, in evaluating *Strickland* prejudice, that is all that matters. *See id.*[8]

For the foregoing reasons, the Eleventh Circuit correctly held that it was an unreasonable application of *Strickland* for the state postconviction courts to deny relief because they concluded that Respondent's mitigating evidence lacked a "causal relationship" to the State's death-eligibility case. Petitioner's challenge to

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[8] More broadly, the weighing function of a state court reviewing a capital sentence depends on the nature of the court's inquiry, but in no context may a state appellate court, let alone a state postconviction court, act as the sentencer would have been entitled to when the state court reweighs mitigating evidence that was *not* presented at sentencing. For example, this Court has approved state direct appeal courts' independently reweighing aggravating and mitigating evidence that *was* presented at sentencing to ensure that a death sentence has not been arbitrarily imposed. *See, e.g., Proffitt v. Florida*, 428 U.S. 242, 253 (1976) (Joint Opinion) (describing Florida law); *see also Strickland*, 466 U.S. at 695 (holding that, where a state direct appeal court undertakes such an independent reweighing, the reasonable probability test must take into account the possibility that the direct appeal court would have invalidated the petitioner's death sentence if the postconviction mitigation had been presented at sentencing). And, *Barclay v. Florida*, cited by Petitioner, Cert. Pet. at 17, holds that the Eighth Amendment permits state direct appeal courts to reweigh aggravating and mitigating evidence in cases where all of that evidence *was* presented to the sentencer, but one of multiple aggravating circumstances found by the sentencer was legally invalid. *See Barclay v. Florida*, 463 U.S. 939 (1983); *see also Clemons v. Mississippi*, 494 U.S. 738 (1990); *Zant v. Stephens*, 462 U.S. 862 (1983). Indeed, the same footnote of the *Barclay* opinion relied upon by Petitioner noted that the validity of the capital sentencing scheme at issue depended upon "evidence of mitigation [not being] excluded from consideration at the sentencing proceeding." *Barclay*, 463 U.S. at 961 n.2 (Stevens, J., concurring in the judgment); *see* Cert. Pet. at 17.

that holding conflates the role of the sentencer with that of a state postconviction court applying *Strickland*.

B. The State Courts Made Additional Unreasonable Errors in Their Application of *Strickland*

Without regard to the state courts' unreasonable imposition of a nexus requirement to discount Respondent's mitigating evidence, the state courts' adjudication of Respondent's ineffective assistance of counsel claim constitutes an unreasonable application of *Strickland* for three reasons. First, the facts of this case are materially indistinguishable from *Williams v. Taylor*; therefore, *Williams* establishes that the state courts unreasonably applied *Strickland* here. Second, the state courts did not evaluate the totality of the mitigating evidence as required by *Strickland*. Third, the state courts unreasonably ignored the distinction between this case, where the death sentence was "only weakly supported by the record," and cases where the death sentence had "overwhelming record support." *Strickland*, 466 U.S. at 696.

1. *This Case is on All Fours with* Williams v. Taylor

In *Williams v. Taylor*, this Court found *Strickland* prejudice because the postconviction mitigation about the habeas petitioner's life history, which was not presented at sentencing, "might well have influenced [the sentencer's] appraisal of his moral culpability." 529 U.S. at 398. The postconviction mitigation here is materially indistinguishable from the postconviction mitigation in *Williams*.

As described above, Herbert Williams's Rule 32 evidence "paint[ed] a vastly different picture of his background." App. 32a. Because of counsel's deficient performance, the sentencing jury and judge never learned that: (1) contrary to the positive depiction of Arcola Williams that the judge relied on in imposing a death sentence, Williams's mother actively abused him and failed to protect him from his father's wanton attacks; (2) both parents so neglected Williams that he lacked adequate food, clothing, and knowledge of rudimentary hygiene; (3) "contrary to the impression created by Arcola Williams, [the] violence [Williams suffered at the hands of the father] was not of a type remotely associated with parental discipline," App. 32a; rather, his father's attacks "were . . . serious assaults, many of which involved the use of deadly weapons" and "resulted in serious injuries," App. 32a; (4) contrary to the sentencing court's conclusion that Williams's father abused him "as a child," Vol. 5 at 192, the violence continued until Williams was seventeen years old and left home permanently after a particularly savage thrashing wherein his father broke a chair over his head; (5) before Williams's eyes, his father issued death threats against members of his immediate family and administered beatings that apparently caused severe brain damage to two of his siblings; and (6) this isolated life of stark deprivation and pervasive violence resulted in Williams's suffering severe depression requiring psychiatric treatment. *See* App. 9a-15a, 32a-33a. This "graphic description of [Herbert] Williams' childhood, filled with abuse

and privation" mirrors the postconviction evidence about Terry Williams's "nightmarish childhood" that undermined confidence in his death sentence. *See Williams v. Taylor*, 529 U.S. at 398, 395 (describing Terry Williams's childhood).

In fact, the only meaningful distinctions between this case and *Williams v. Taylor* cut in Respondent's favor: first, unlike Terry Williams, who was 31 at the time of his capital crime, *see* 487 S.E.2d at 199, Herbert Williams was still a teenager, *see generally Eddings v. Oklahoma*, 455 U.S. 104, 115-16 (1982) (given the capital defendant's youth, "there can be no doubt that evidence of a turbulent family history, of beatings by a harsh father, and of severe emotional disturbance is particularly relevant"); and, second, the aggravating evidence in *Williams v. Taylor* was far stronger than it was here. *See* Part B.3, *infra*.

Thus, as in *Williams v. Taylor*, the entire postconviction record, "viewed as a whole and cumulative of mitigation evidence presented originally," creates a reasonable probability that the result of the sentencing proceeding would have been different if competent counsel had presented the available mitigating evidence. 529 U.S. at 399. It follows that the Alabama Court of Criminal Appeals, which held that Williams's postconviction evidence "ha[d] little mitigation value" and thus denied relief, App. 134a, rendered a decision that was contrary to, or involved an unreasonable application of, clearly established law.[9]

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[9] As noted, in addition to describing the severe abuse and deprivation Herbert Williams

2. The State Courts did not Evaluate the Totality of Respondent's Mitigation

As Petitioner repeatedly acknowledges, *Strickland* requires courts to evaluate the totality of the mitigating evidence that was presented both at trial and at postconviction. Cert. Pet. at 19, 21, 22, 23, 25, 28-29; *see Strickland*, 466 U.S. at 695. Yet, contrary to Petitioner's assertion that the state courts considered the "entire body of Williams's new mitigating evidence in their prejudice inquiries," Cert Pet. at 19, the Eleventh Circuit correctly recognized that the state courts "'failed to evaluate the totality of the available mitigation evidence in reweighing the aggravating and mitigating circumstances in this case,'" and that this failure constituted "an unreasonable application of *Strickland*." App. 36a-37a.

In addressing Respondent's ineffective assistance of counsel claim, the Alabama Court of Criminal Appeals—adopting wholesale the trial judge's postconviction order (which itself adopted the State's proposed order)—recited verbatim the sentencing court's description of the single aggravator without any

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suffered, the postconviction evidence also revealed the serious psychological difficulties that he experienced (namely, suicidal tendencies and severe depression requiring psychiatric treatment). The postconviction evidence further showed that Williams has a low IQ. Vol. 14 at 123. Thus, as in *Williams v. Taylor*, the postconviction evidence revealed that Herbert Williams had significant mental health/cognitive difficulties. *See* 529 U.S. at 396, 398. But, even absent this additional similarity, the Alabama Court of Criminal Appeals' decision would be unreasonable because *Williams v. Taylor* holds that postconviction evidence *either* of a severely abused and deprived background, or of serious mental health/cognitive difficulties, undermines confidence in a death sentence. *See* 529 U.S. at 398 ("[T]he graphic description of Williams' childhood, filled with abuse and privation, *or* the reality that he was 'borderline mentally retarded,' might well have influenced the [sentencer's] appraisal of his moral culpability.") (emphasis added).

corresponding description of the three mitigators found at sentencing, the substantial weight due the jury's life recommendation, or the extensive mitigating evidence presented at postconviction that was missing from sentencing because of counsel's deficient performance. *See* App. 138a-140a. The state courts did not even cursorily describe, *inter alia*, the postconviction evidence of Herbert Williams's mother's abuse and neglect, the severity of his father's criminal abuse, his family's abject poverty, or his inpatient observation and psychiatric treatment for serious depression. *See* App. 133a-140a.

Indeed, as the Eleventh Circuit recognized, because the state postconviction courts failed to evaluate the totality of Respondent's mitigating evidence, they did not recognize that the postconviction evidence refuted the sentencer's conclusion—based on the inaccurate picture allowed by trial counsel's failures—that Arcola Williams was a caring mother who had an excellent reputation. App. 33a, 36a. Rather, the state courts described the postconviction evidence regarding the horror and privation Herbert Williams suffered as nothing more than abuse by Williams's father. App. 133a-134a ("This [Rule 32] testimony was presented to show that Williams was physically abused *by his father* as were other members of his family. . . . Any additional testimony offered by Williams at the Rule 32 evidentiary hearing *that he was physically abused by his father* has little mitigation value . . .") (emphases added). And, as the Eleventh Circuit explained, "[g]iven the

importance the trial judge placed on Williams' relationship with his mother and his purported lack of deprivation [in deciding to override the jury's 9-3 life recommendation and sentence Williams to death]," evidence about Williams's mother's abuse and neglect "clearly would have been beneficial to Williams had it been presented." App. 33a.

The Eleventh Circuit correctly concluded that the state courts' failure to acknowledge the postconviction evidence—much less to consider it as part of the holistic evaluation of trial and postconviction mitigation required by *Strickland*—was an unreasonable application of clearly established federal law. *See* App. 36a-37a; *see also Williams v. Taylor*, 529 U.S. at 397-98 (holding state court's conclusion that petitioner was not prejudiced to be "unreasonable insofar as it failed to evaluate the totality of the available mitigation evidence—both that adduced at trial, and . . . in the habeas proceeding").

3. The State Courts Ignored Strickland's *Distinction Between Highly Aggravated Death Sentences and Death Sentences Weakly Supported by the Record*

As the Eleventh Circuit recognized, under *Strickland*, "'a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support.'" App. 33a (quoting *Strickland*, 466 U.S. at 696). According to Judge McRae's trial findings, on one side of Williams's sentencing scale were three mitigators (one non-

statutory) along with the jury recommendation for life, which the trial court recognized was due substantial weight. On the other side was the one statutory aggravator, the robbery, an element of the capital charge. In sentencing Williams to death, Judge McRae stated that, in his view, the "single statutory aggravating circumstance" outweighed "all the statutory and non-statutory mitigating circumstances," plus the "very serious consideration and substantial weight" due the jury's life recommendation on the mitigating side of the scale. Vol. 5 at 193.

Because there were strong mitigators and a single aggravator, and because the jury had decisively recommended life, Williams's death sentence epitomized "a verdict or conclusion only weakly supported by the record," *Strickland*, 466 U.S. at 696. *See* App. 33a-34a (recognizing that "this case is not highly aggravated" and the "relative weakness of the state's death penalty case is underscored by the fact that the jury recommended a life sentence by a vote of 9-3," even though the jury did not know about "the powerful [mitigating] evidence adduced at postconviction").

Notwithstanding the foregoing, Petitioner continues to embrace the state postconviction courts' reliance on two inapposite Eleventh Circuit cases for the proposition that Williams was not prejudiced by counsel's failure to investigate. Cert. Pet. at 12 & n.2. As Judge McRae himself recognized, however, those two cases both involved torture, and one also involved a rape. App. 139a (citing and

describing *Francis v. Dugger*, 908 F.2d 696, 703-04 (11th Cir. 1990) and *Thompson v. Wainwright*, 787 F.2d 1447, 1453 (11th Cir. 1986)). In Williams's case, the murder involved no torture or sexual assault; as noted, the sentencing court explicitly concluded that the "heinous, atrocious or cruel" aggravator permitted under Alabama law did not apply. Vol. 5 at 190. Under clearly established law, the calibration of prejudice resulting from counsel's deficient performance in this capital case, which was not highly aggravated, is very different from that in a highly aggravated case. *See Strickland*, 466 U.S. at 696, 700; *Wiggins*, 539 U.S. at 537-38. Thus, the state courts' reliance on *Francis* and *Thompson*, cases in which the death sentence had "overwhelming record support," to conclude there was no prejudice here, where the death sentence was "only weakly supported by the record," constitutes another unreasonable application of *Strickland*. *Strickland*, 466 U.S. at 696.

Indeed, in applying § 2254(d)(1), this Court has held that *Strickland* required relief even when the death sentence had far greater record support than the sentence in Williams's case. As discussed, in *Williams v. Taylor*, this Court held that the Virginia Supreme Court unreasonably denied relief under *Strickland* because the postconviction evidence of "abuse and privation . . . might well have influenced the jury's appraisal of [the petitioner's] moral culpability" and therefore changed the outcome of the sentencing proceeding. 529 U.S. at 398; *see id.* at 399.

The *Williams* Court reached this conclusion even though: (1) the prosecution's case in aggravation was strong—in the months following the murder for which he was being sentenced, the habeas petitioner, *inter alia*, "had savagely beaten an elderly woman [leaving her in a vegetative state], stolen two cars, set fire to a home, stabbed a man during a robbery [and arson], and confessed to [having strong urges to choke] two inmates and break[] a fellow prisoner's jaw," *Wiggins*, 539 U.S. at 537 (describing *Williams*); *see also Williams*, 529 U.S. at 368; and (2) the additional evidence discovered during postconviction was not entirely favorable to the petitioner, as it also revealed a series of crimes he had committed as a youth, *see Williams*, 529 U.S. at 396.

Unlike in *Williams v. Taylor*, the evidence in this case showed that despite his upbringing steeped in violence and privation, Herbert Williams had no prior criminal record before this offense, and there was no evidence that he had engaged in any other violent conduct. Therefore, "in contrast to the petitioner in *Williams v. Taylor*, [Herbert Williams] does not have a record of violent conduct that could have been introduced by the State to offset th[e] powerful mitigating narrative" that counsel failed to present as a result of their deficient performance. *Wiggins*, 539 U.S. at 537.[10]

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[10] The Commissioner emphasizes the prosecution's evidence indicating that Respondent's capital offense was deliberate. Cert. Pet. at 3, 6. Any such evidence does not change the fact that the aggravating evidence in *Williams v. Taylor* (concerning a 31-year-old offender who had

In short, because "the State's evidence in support of the death penalty [is] far weaker" here than it was in *Williams v. Taylor*, *id.* at 538, and because the postconviction mitigation was comparable, under clearly established law, Herbert Williams was prejudiced by his counsel's deficient performance. As in *Williams v. Taylor*, the state courts' contrary conclusion was an unreasonable application of *Strickland*.

CONCLUSION

At bottom, Petitioner seeks this Court's review of a routine federal habeas decision whose outcome was required by *Strickland* and its progeny and 28 U.S.C. § 2254(d)(1). Respondent respectfully requests that this Court deny the petition for certiorari.

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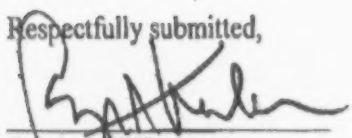
committed multiple violent felonies) was far stronger than it was here, where Herbert Williams was a 19-year-old first-time offender, and the trial judge expressly found that the only aggravator was the underlying robbery. Indeed, after hearing the aggravating evidence, the jury in *Williams v. Taylor* unanimously imposed death, *see* 529 U.S. at 370, whereas Herbert Williams's jury recommended life without parole by a 9-3 vote.

It is also worth noting that this Court has rejected unequivocally the deliberateness of a capital crime as a basis for assuming that a sentencer would discount mitigation related to a defendant's life history. *See e.g.*, *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 254 (2007); *id.* at 237-42 (describing petitioner's deliberately planned crime and mitigating evidence). A reasonable sentencer may conclude that, even if a capital crime was deliberate, and even if "deliberate" means something beyond "intentional," the defendant should receive a life without parole sentence because his troubled background renders him less morally culpable than other capital defendants. *Penry*, 492 U.S. at 322-23; *see also id.* at 322 ("Personal culpability is not solely a function of a defendant's capacity to act 'deliberately.'"); *Wiggins*, 539 U.S. at 535 (citing *Penry* for the proposition that "[p]etitioner . . . has the kind of troubled history we have declared relevant to assessing a defendant's moral culpability").

Respectfully submitted,



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No. 08-1032

In the
Supreme Court of the United States

RICHARD F. ALLEN,
Commissioner of Alabama Dept. of Corrections,
Petitioner,
v.
HERBERT WILLIAMS, JR.,
Respondent.

On Petition for a Writ of Certiorari to
The Court of Appeals for
the Eleventh Circuit

CERTIFICATE OF SERVICE

I, Laura Fernandez, do swear or declare that on this date, April 14, 2009, as required by Supreme Court Rule 29, I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 days.

The names and addresses of those served are as follows:

J. Clayton Crenshaw
Counsel of Record
Troy King
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I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 14, 2009.

Laura Fernandez